Supreme Court, U.S.
FILED

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OFFICE OF THE CLERK

No.

In The

Supreme Court of the United States

October Term, 1997

PAUL G. SHULTZ,

Petitioner,

vs.

DEPARTMENT OF ARMY, UNITED STATES OF AMERICA,

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED FOR REVIEW

In 1907 George Nissen, Paul Shultz's predecessor in interest, established a homestead with foot trail access to the City of Fairbanks. Nissen's access was over public lands, which were later (1937) withdrawn by the Department of the Army for use as a military reservation. The land withdrawals were subject to valid existing rights. Shultz, Nissen's successor in interest, had access until 1981, when the Department of the Army unilaterally and arbitrarily denied him access. The Department of the Army refused to recognize that a public right-of-way existed. The District Court held that Nissen's foot trail did not qualify as a public right-of-way per 43 U.S.C. § 932 (RS 2477).

The Ninth Circuit Court of Appeals reversed the District Court, holding that Nissen's foot trail did constitute an RS 2477. Then, in a most unusual manner, the Ninth Circuit reversed itself without explanation. The validity of Nissen's RS 2477 right-of-way is a matter that affects not only Shultz's property, but also states' rights concerning the acceptance and establishment of a public right-of-way per 43 U.S.C. § 932. The questions presented by this petition are:

1. Has the Ninth Circuit Court of Appeals misinterpreted and misapplied Alaska law concerning 43 U.S.C. § 932?

    a. Under Alaska law, is a foot path sufficient to qualify as an RS 2477?

    b. Under Alaska law, must an RS 2477 be confined to its original location?

2. Did the Ninth Circuit Court of Appeals depart from accepted judicial standards and precedent, by reversing, withdrawing, and replacing its twenty-four (24) page opinion, with a one (1) page per curium decision:

a. with no explanation;

b. when no new evidence was presented on rehearing; and,

c. without recognition of controlling state law, *Fitzgerald v. Puddicombe*, 918 P.2d 1017 (Alaska 1996)?

PARTIES TO THE PROCEEDING

In addition to the parties listed in the caption, the Court of Appeals accepted amicus curiae briefs from the following parties: The State of Alaska; the State of Utah and the Utah Association of Counties; the National Parks and Conservation Association; the Pacific Legal Foundation; and the Tanana Chiefs Conference, Inc.

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Petitioner, Paul G. Shultz, respectfully petitions for a writ of certiorari, to review the judgment and opinion of the United States Court of Appeals for the Ninth Circuit entered in this proceeding on September 20, 1996: In order to resolve a conflict between the Ninth Circuit Court of Appeals and The Supreme Court of the State of Alaska; and, to review the course of judicial proceedings before the Ninth Circuit Court of Appeals, which has departed from the accepted and usual course of judicial proceedings.

OPINIONS BELOW

The Ninth Circuit Court of Appeals issued three opinions concerning Paul G. Shultz and the claims which are the subject of this petition. The first opinion dated September 28, 1989, *Shultz v. Army*, 886 F.2d 1157 (9th Cir. 1989) (*Shultz I*), is reproduced as Appendix E, hereto (App. E). The second opinion dated November 30, 1993, *Shultz v. Army*, 10 F.3d 649 (9th Cir. 1993) (*Shultz II*), is reproduced as App. B, hereto. The third opinion, following rehearing and reargument, dated September 20, 1996, *Shultz v. Army*, 96 F.3d 1222 (9th Cir. 1996) (*Shultz III*), is reproduced as App. A, hereto.

STATEMENT OF JURISDICTION

The decision of the Ninth Circuit Court of Appeals being appealed was entered September 20, 1996. Petitioner, Paul G. Shultz, filed a timely petition for rehearing and the rehearing was granted on October 8, 1997; a copy is attached as App. G, hereto. The order granting rehearing did not alter the Ninth Circuit Court of Appeals Opinion dated September 20, 1996.

This Petition for Writ of Certiorari is timely filed in accordance with Rule 13.3 of the Rules of this Court. This Court has jurisdiction over this matter pursuant to 28 U.S.C. § 1254(1).

In conformance with Rule 29.4(a), the Solicitor General of the United States has been served at Room 5614, Department of Justice, 10th St. and Constitution Ave., N.W., Washington DC 20530. In addition to the Solicitor General, the Attorneys who have made an entry of appearance on behalf of the Department of the Army in this litigation have also been served: William B. Lazarus and Bruce Landon.

STATUTE INVOLVED

The statute involved is 43 U.S.C. § 932, commonly and interchangeably referred to as RS 2477. This statute was repealed October 21, 1976; however, the repeal does not affect rights-of-way that predate the repeal.[1] The statute is brief and reads in total as follows:

> *Right-of-Way for Highways.* The right of way for the construction of highways over public lands, not reserved for public uses, is hereby granted.

43 U.S.C. § 932.

---

1. The Historical Note to the Statute states as follows:

> Section, R.S. § 2477, authorized rights-of-way for the construction of highways over public lands not reserved for public uses.
>
> Effective Date of Repeal. Section 706(a) of Pub. L. 94-579 provided in part that this section is repealed effective on and after Oct. 21, 1976.
>
> Savings Provisions. Repeal by Pub. L. 94-579 not to be construed as terminating any valid lease, permit, patent, etc., existing on Oct. 21, 1976, see section 701 of Pub. L. 94-579, set out as a note under section 1701 of this title.

STATEMENT OF THE CASE

Paul Shultz (Shultz) owns land, whose only access is through a military reservation, Fort Wainwright, which is controlled by the Respondent, Department of Army, United States of America hereto (Army). Shultz's predecessor in interest, George Nissen (Nissen) entered the property to homestead in 1907. Nissen received a patent to the property in 1924. Commencing in 1937, Fort Wainwright (formerly known as Ladd Field) was created by a series of government land orders and land purchases. Each land order and acquisition contained language indicating that it was "subject to . . . existing rights."

Land access between Shultz's property and the City of Fairbanks has always existed. The route of the access has varied from time to time; however, the termini (Shultz's property and the City of Fairbanks) have always remained the same. Shultz maintains that there is a public right-of-way between his property and the City of Fairbanks, through Fort Wainwright pursuant to 43 U.S.C. § 932, and/or by reason of common law.

Initially, the District Court dismissed Shultz's complaint, holding that his claim was time barred by the statute of limitations set forth in 28 U.S.C. § 2409a(g). *See* App. F, hereto. This dismissal was reversed on appeal in *Shultz I*. The Court of Appeals held that the installation of a fence, and a gate and guard house, which were not used, was insufficient notice to trigger 28 U.S.C. § 2409a(g). *Id.* at 1161.

Following reversal and remand, the District Court held a five (5) day judge trial. The District Court ruled against Shultz. The District Court entered fourteen (14) pages of findings of facts and conclusions of law to support its judgment in favor of the Army and against Shultz. *See* App. C and D, hereto. The District Court found that Shultz's predecessor in interest (Nissen)

had land access to his homestead prior to 1918, and that Shultz had proven that his property has had continual access through Fort Wainwright to date. However, the District Court ruled against Shultz because it opined that a foot path or trail was not sufficient to establish an RS 2477. The District Court believed that proof of a wagon quality road with an exact location was required. Shultz appealed, and again, the Ninth Circuit Court of Appeals reversed. *See Shultz II*. The Ninth Circuit Court of Appeals, relying on the record and facts as found by the District Court, determined that Shultz had satisfied his burden of proof. In a unanimous decision, the Ninth Circuit Court of Appeals adopted the State of Alaska's definition of a highway, holding that a foot path suffices and that proof of the exact location of the original trail is unnecessary. An existing road, even if it is at variance with the original road or roads, is sufficient to establish a right-of-way.

> This is not a case where "[t]here simply was no evidence that would have allowed the [district] court to conclude that before [1937] the public used [historical trails] in such a manner as to accept the § 932 grant." *Dillingham*, 705 P.2d at 415. The evidence was to the contrary. The district court's own factual findings establish that a trail was established in the early days of Nissen's residency. The district court acknowledged the presence of a significant number of homesteaders along the Chena River (DCF 12) all of whom presumably made their way back and forth between each others' properties and town. It acknowledged the existence of a footbridge on Nissen's property suggesting a foot trail (DCF 35) leading west to Fairbanks. Tr. III at 10-11. Indeed, in the face of numerous affidavits noting frequent travel, the district court found that Nissen *used* Wiest Road (DCF 36); he just thought it

inadequate use occurring too late. The district court never found that no trail or road existed during the critical time. What it did find — that Nissen used the river to transport his crops and that he did not use one of the roads until 1918 — has no foundation in the record. All of the evidence points to the existence of a publicly used land route between the Nissen homestead and town.

* * *

The route was there. The homesteaders used it. No one challenged their right.

* * *

One continuous route exists. *Apart from the restrictions imposed by the permitting system initiated in 1981, the route has always provided unobstructed through passage across the base to the public.*

We agree with Shultz's analysis. When a modern route is open, the fact that an Army facility is placed over an historical route, one no longer forming part of the network of roads that link Fairbanks with the communities east of the base, is insufficient to "excite attention" or put civilians "on guard" that their right to cross the military installation has been challenged. It would not be reasonable to require civilians to monitor the Army's obstruction of historical routes in order to preserve the right to use the modern throughway. *Shultz,* 886 F.2d at 1160. Only when present day patterns of travel across the base are interfered with is it proper to charge

> individuals with the knowledge of the government's claim over that route. Prior to 1981, it appears no "uncontroverted instance[] of notice," *Nevada*, 731 F.2d at 635, served to alert civilians that their right of passage, preserved by the proviso to the Army's acquisition of the land, was in jeopardy.

Emphasis added and footnotes omitted. *Shultz*, 10 F.3d at 658-659, 661-662.

The Army petitioned for rehearing. The National Parks and Conservation Association and the Tanana Chiefs Conference, Inc. joined in the Army's petition and requested amicus curiae status. The State of Alaska, the Pacific Legal Foundation, the State of Utah, and the Utah Association of Counties petitioned to intervene and requested amicus curiae status on behalf of Shultz. All of the petitions to intervene were granted and the matter was reargued on December 15, 1994. Twenty-one (21) months later, the Ninth Circuit Court of Appeals reversed itself in a split decision. By a per curium opinion, the two justice majority (which included the author of *Shultz II*) reversed their prior decision and now agreed with the District Court that Shultz's proof was insufficient. *See Shultz III*. The dissenting justice stated that he would have denied the petition for rehearing for the reasons set forth in *Shultz II*.

Shultz II recognized the interrelationship between state and federal law involving the application of 43 U.S.C. § 932. *See Shultz II* at 655. *Shultz II* specifically referred to and relied on the Alaska Supreme Court's holdings from: *Alaska v. Alaska Land Title Ass'n*, 667 P.2d 714 (Alaska 1983); *Dillingham Commercial Co., Inc. v. City of Dillingham*, 705 P.2d 410 (Alaska 1985); *Fisher v. Golden Valley Elec. Ass'n, Inc.*, 658 P.2d 127 (Alaska 1983); *Girves v. Kenai Peninsula Borough*, 536 P.2d 1221 (Alaska 1975); *Hamerly v. Denton*, 359 P.2d 121 (Alaska

1961); *McGill v. Wahl*, 839 P.2d 393 (Alaska 1992); and, *Mercer v. Yutan Constr. Co.*, 420 P.2d 323 (Alaska 1966). In the interim, between the publication of *Shultz II* and *Shultz III*, the Alaska Supreme Court adopted the reasoning and ruling of *Shultz II*. *See Fitzgerald v. Puddicombe*, 918 P.2d 1017, 1021-1022 (Alaska 1996), a copy of which is attached hereto as App. H. Like *Shultz II*, *Fitzgerald* held that proof of a precise trail is unnecessary to establish an RS 2477 right-of-way. All that is required is evidence "show[ing] that there was a generally — followed route across the land in question. *See Shultz II*, 10 F.3d. 655. ***" *Fitzgerald*, 918 P.2d. at 1021-1022. *Fitzgerald* also adopted *Shultz II's* holding that, "the barest foot trail may qualify for RS-2477 status. ***" *Shultz*, 10 F.3d at 658, and *Fitzgerald*, 918 P.2d at 1020.

REASONS FOR GRANTING THE WRIT

I.

A CONFLICT EXISTS BETWEEN THE NINTH CIRCUIT COURT OF APPEALS AND THE SUPREME COURT OF THE STATE OF ALASKA IN THE APPLICATION OF 43 U.S.C. § 932.

The interpretation of 43 U.S.C. § 932 (RS 2477) involves an interrelationship between federal and state law. It is state law that defines the term highway and the acceptable methods to dedicate a right-of-way as public. This Court, in *United States v. Oklahoma Gas and Electric Co.*, 318 U.S. 206, 209-210, 63 S. Ct. 534, 536, 87 L. Ed. 716, 720 (1943), held that state law controls the criteria for conveyances of federal land. This reasoning has been reiterated in several circuit court decisions.

> Having considered the arguments of all parties, we conclude that the weight of federal regulations, state

> court precedent, and tacit congressional acquiescence compels the use of State law to define the scope of an R.S. 2477 right-of-way.

Sierra Club v. Hodel, 848 F.2d 1068, 1083 (10th Cir. 1988).

The same conclusion was reached in dicta by the D.C. Circuit.

> There is no question that the State, at least formally, has indicated its intention to construct a public highway along the right-of-way requested.
>
> * * *
>
> Ordinarily this expression of intent would constitute valid acceptance of the right-of-way granted in Section 932. That section acts as a present grant which takes effect as soon as it is accepted by the state.
>
> * * *
>
> All that is needed for acceptance is some "positive act on the part of the appropriate public authorities of the state, clearly manifesting an intention to accept ***." *Hamerly v. Denton*, Alaska, 359 P.2d 121, 123 (1961). [Citations and footnotes omitted.]

Wilderness Society v. Morton, 479 F.2d 842, 882 (D.C. Cir. 1973), *cert. denied*, 411 U.S. 917, 93 S. Ct. 1550, 36 L. Ed. 2d 309 (1973).

The Alaska Supreme Court has reached the same conclusion.

> The Appellants suggest, however, that federal rather than state law governs this issue since AS 19.10.010 was an acceptance of an offer by the Federal Government to grant an easement. This argument fails, however, because "a conveyance by the United States of land, which it owns . . . is to be construed, in the absence of any contrary indication of intention, according to the laws of the State where the land lies." *United States v. Oklahoma Gas and Electric, Co.*, *** [Citations and footnotes omitted.]

Fischer v. Golden Valley Electric Association, 658 P.2d 127, 130 (Alaska 1983).

Shultz II recognized this interplay between state and federal law. *See Shultz*, 10 F.3d at 655.

The Alaska Supreme Court recently addressed some of the same issues which were ruled on in *Shultz II*. The Alaska Supreme Court cited with approval and adopted portions of *Shultz II* relating to the necessary proof to establish and locate an RS 2477. *Shultz III* is in conflict.

The criteria for establishing an RS 2477 is an important issue in the State of Alaska, as well as in a number of other western states. *Shultz III* has created a conflict between the Supreme Court of the State of Alaska and the Ninth Circuit Court of Appeals concerning the proof required to establish an RS 2477. The Alaska Supreme Court's *Fitzgerald* decision clearly signaled that it approved and accepted the law and reasoning in *Shultz II*. *Shultz III's* rejection of *Shultz II* places the Ninth Circuit in direct conflict with the Alaska Supreme Court's

holding in *Fitzgerald,* and *Dillingham Commercial Co., Inc. v. City of Dillingham,* 705 P.2d 410 (Alaska 1985).

Shultz III agreed with the District Court — "That Shultz has not sustained his burden to factually establish a continuous RS 2477 route or a right-of-way under Alaska Common Law. ***" Nissen's homestead application contained the affidavits of Melvin Sabin and James Weist, two (2) of his neighbors who lived on the same road system, confirming that they witnessed Nissen going to and from his property on a regular basis from as early as 1907. The District Court accepted this evidence, but concluded that it was not sufficient, because at most, Nissen established only a footpath or trail. The District Court opined that a "wagon road" must exist. Given these findings of fact, *Fitzgerald* requires a different conclusion. *Fitzgerald* specifically held that the route need not be fully developed to qualify as a public right-of-way and that a "rudimentary trail can qualify."

> Nor does the route need to be significantly developed to qualify as a "highway" for RS 2477 purposes; even a rudimentary trail can qualify. See *Dillingham,* 705 P.2d at 414; *Shultz,* 10 F.3d. at 656-57. ***

918 P.2d at 1020.

The District Court required Shultz to prove an exact route and location. The District Court acknowledged that Shultz and his predecessors had generally followed the same access; however, the District Court held that such historic use alone was not sufficient. *Fitzgerald* held the opposite. In *Fitzgerald,* like *Shultz II,* there were multiple trails. The Alaska Supreme Court held that a precise trail need not be proven — it is enough to show a generally followed route.

> In any event, it is not necessary, as the trial court appears to suggest in its findings, that the precise path of the trail be proven. It is enough for one claiming an RS 2477 right-of-way to show that there was a generally-followed route across the land in question. *See, Shultz,* 10 F.3d at 655. ***"

918 P.2d at 1021-1022.

It is self-evident from a reading of *Fitzgerald* that *Shultz II* correctly analyzed and applied Alaska law. Not only are the same theories addressed in both *Shultz II* and *Fitzgerald,* but *Fitzgerald* cites *Shultz II* repeatedly with approval for the same propositions. *Shultz III* is incompatible and irreconcilable.

II.

THE NINTH CIRCUIT COURT OF APPEALS DEPARTED FROM ACCEPTED JUDICIAL PRECEDENT.

It is self-evident from reading *Shultz II* that the Ninth Circuit Court of Appeals was well-informed of the Alaska rule of law applicable to establishing RS 2477 rights-of-way. If any doubt existed, that doubt was laid to rest by the *Fitzgerald* decision, which was decided five months prior to *Shultz III*. Notwithstanding the clear Alaska rule of law, the Ninth Circuit Court of Appeals vacated *Shultz II* without giving a reason. No new case law was introduced by either the Army or those amicus curiae supporting the Army's position. As noted *supra,* the only pertinent judicial decision in the interim was *Fitzgerald,* which is totally contrary to *Shultz III.* While *Shultz III* gives lip service to the District Court's finding of insufficient proofs, no explanation is given as to why Shultz's proofs are suddenly insufficient. After three (3) years, the withdrawal of a twenty-four (24) page written opinion with the substitution of a less

than one (1) page per curium decision is arbitrary and indefensible.

The time from the Notice of Appeal until the decision in *Shultz II* was seventeen (17) months. *Shultz II* was a unanimous decision. *Shultz II* is a twenty-four (24) page opinion. *Shultz II* demonstrates a recognition of Alaska law. *Fitzgerald* unequivocally confirms that the District Court misinterpreted and misunderstood the applicability of Alaska law. *Shultz II* applied Alaska law to the District Court's Findings of Facts.

In contrast to *Shultz II*, in *Shultz III*: the court took twice as long to decide, nearly three (3) years, (thirty-four (34) months from the date of *Shultz II*); the opinion was less than one (1) page; the decision was per curium; the author of the opinion in *Shultz II* joined in the per curium decision without explanation; and, the panel was split. *Shultz III* is not the product of a change in Alaska law or new evidence. *Fitzgerald* confirmed that *Shultz II* correctly applied Alaska law and reached the right decision. *Shultz II* adopted the facts found by the District Court. There is no conceivable or reasonable explanation for *Shultz III*.

Shultz III, because it is a per curium opinion, approves the District Court's misinterpretation and misapplication of Alaska law. *Shultz III* establishes an erroneous precedent: concerning the proofs required in Alaska to establish an RS 2477; and, the interrelationship between Federal and State Law dealing with RS 2477 rights-of-way.

CONCLUSION

It is incongruent for the Federal Government to have encouraged homesteading and then argue that homesteads are landlocked — without access by use of a public right-of-way. Congress enacted legislation to establish homesteads (43 U.S.C.

§§ 161-302) and access to those homesteads by public rights-of-way. If there is doubt about this proposition, *see* 43 U.S.C. § 1063 — prohibiting obstructions in conjunction with settlements. The Ninth Circuit is thwarting these Congressional Acts by requiring unreasonable proofs. Common sense dictates that if a homestead has been proven and patented, legal access must be established. Property without access has no value. If a need existed, 43 U.S.C. § 932 was intended to satisfy that need.

Alaska law governs the issue in this litigation. *Shultz II* correctly interpreted and applied Alaska law. The Ninth Circuit's decision in *Shultz III* is in conflict with the Alaska Supreme Court's *Fitzgerald* decision. *Fitzgerald* and *Shultz II* correctly applied 43 U.S.C. § 932. Nothing in this statute or Alaska case law mandates the construction of a wagon road. For these reasons, Shultz's Writ of Certiorari should be granted.

Respectfully submitted,

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APPENDIX

APPENDIX A — OPINION AND ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT FILED SEPTEMBER 20, 1996, REPORTED AT 96 F.3d 1222 (9th Cir. 1996)

FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

Nos. 92-35197
92-35580

D.C. No. CV-86-30-AJK

ORDER AND OPINION

PAUL G. SHULTZ,

Plaintiff-Appellant,

v.

DEPARTMENT OF ARMY, UNITED STATES OF AMERICA,

Defendant-Appellee.

Appeals from the United States District Court
for the District of Alaska
Andrew J. Kleinfeld, District Judge, Presiding

Argued and Submitted
August 3, 1993 — Anchorage, Alaska

Opinion filed November 30, 1993
Reargued December 15, 1994
San Francisco, California

Appendix A

Withdrawn from Submission March 15, 1995
Resubmitted September 12, 1996
Opinion Withdrawn September 20, 1996

Filed September 20, 1996

Before: Mary M. Schroeder, Betty B. Fletcher and Arthur L. Alarcon, Circuit Judges.

Per Curiam Opinion;
Dissent by Judge Alarcon

SUMMARY

Real Estate/Covenants and Easements

The court of appeals, in a per curiam opinion substituting for an earlier opinion ordered withdrawn, affirmed a district court judgment. The court held that a landowner asserting an easement over government property in Alaska must establish a continuous route or right of way.

Appellant Paul Shultz claimed that he had a right-of-way across Fort Wainwright to get back and forth between Fairbanks and his property. Shultz brought a quiet title action against the United States. The district court found in favor of the government and Shultz appealed.

Shultz has not sustained his burden to factually establish a continuous route or a right-of-way under Alaska common law. Therefore, the district court judgment is affirmed. Shultz'sargument that the district court erred by holding that his action was time-barred is not reached.

Appendix A

COUNSEL

Joseph W. Sheehan, Fairbanks, Alaska, for the plaintiff-appellant.

William B. Lazarus, United States Department of Justice, Environment & Natural Resources Division, Washington, D.C. for the defendant-appellee.

Sheri L. Hazeltine, Fairbanks, Alaska, for Amicus, The Tanana Chiefs Conference, Inc.

Robin L. Rivett, Pacific Legal Foundation, Sacramento, California, for Amicus, Pacific Legal Foundation, Resource Development Council for Alaska, and Alaska Miners Association.

Cheri C. Jacobus, Assistant Attorney General, Anchorage, Alaska, for Amicus, State of Alaska.

Steven F. Alder, Assistant Attorney General, Salt Lake City, Utah, for Amicus, The State of Utah and the Utah Association of Counties.

ORDER

The opinion dated November 30, 1993 is withdrawn.

OPINION

PER CURIAM:

Appendix A

The government's petition for rehearing is granted, the opinion of November 30, 1993 at 10 F.3d 649 is withdrawn, and the following opinion is substituted in its place.

Paul G. Shultz appeals the district court's judgment in favor of the government in his quiet title action under 28 U.S.C. § 2409a. Shultz argued that he has a right-of-way across Fort Wainwright to get back and forth between Fairbanks and his property under either R.S. 2477, 43 U.S.C. § 932, or Alaska common law, or both. Because we ultimately agree with the district court that Shultz has not sustained his burden to factually establish a continuous R.S. 2477 route or a right-of-way under Alaska common law, we affirm the district court. We do not reach Shultz's argument that the district court erred by holding that his action was time-barred by 28 U.S.C. § 2409a(g).

AFFIRMED.

ALARCON, Circuit Judge, dissenting:

I respectfully dissent.

I would deny the petition for a rehearing and reverse the district court's judgment for the reasons set forth in Judge Fletcher's scholarly opinion in *Shultz v. Department of the Army*, 10 F.3d 649 (9th Cir. 1993).

APPENDIX B — OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT FILED NOVEMBER 30, 1993, REPORTED AT 10 F.3d 649 (9th Cir. 1993)

FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

Nos. 92-35197
92-35580

D.C. No.CV-86-30-AJK

PAUL G. SHULTZ,

Plaintiff-Appellant,

v.

DEPARTMENT OF ARMY, UNITED STATES OF AMERICA,

Defendant-Appellee.

OPINION

Appeal from the United States District Court
for the District of Alaska
Andrew J. Kleinfeld, District Judge, Presiding

Argued and Submitted
August 3, 1993 — Anchorage, Alaska

Filed November 30, 1993

Before: Mary M. Schroeder, Betty B. Fletcher and
Arthur L. Alarcon, Circuit Judges.

Appendix B

Opinion by Judge Fletcher

SUMMARY

Real Estate/Covenants and Easements/Public Lands

The court of appeals reversed a district court judgment. The court held that a plaintiff established a public right of way over a military base by showing that a trail across the area where the base lies was used before the government established the base.

Appellant Paul Shultz owns property to the northeast of Fort Wainwright, and he must cross the base to get to the town of Fairbanks. The government acquired the land upon which the base is situated beginning in 1937, taking it "subject to valid existing rights."

Shultz traces his title through George Nissen, who entered the property in 1907, and was issued a homestead patent in 1924.

In 1981, the Army instituted a pass system for vehicles entering or crossing the base. When Shultz did not present a pass, the Army refused him entry. Without access through the base, Shultz was landlocked.

In 1986, Shultz filed a quiet title action, seeking access across the base. The district court granted the Army summary judgment on statute of limitations grounds. The Ninth Circuit reversed and remanded.

The district court acknowledged the existence of a footbridge on Nissen's property suggesting a foot trail leading to Fairbanks, and found that Nissen actually used a road across the area where the base lies. The court, however, found that

Appendix B

Shultz established no public rights of way under 43 U.S.C. § 932 (RS 2477 public rights of way) or public easements, and entered judgment for the Army.

Shultz appealed, contending that an easement, whether of RS 2477 or common law origin, predated the Army's acquisition of the base landholding.

An RS 2477 right of way comes into existence when a public highway is established across public lands in accordance with state law. Courts must look to the circumstances as they existed at the time of establishment of a claimed RS 2477 right of way. A few homesteaders traversing difficult terrain in difficult climatic conditions may lay claim to an RS 2477. Moreover, the barest foot trail may qualify for RS 2477 status.

The district court's own factual findings established that a trail was established in the early days of Nissen's residency. The court acknowledged the presence of a significant number of homesteaders who presumably made their way back and forth between each others' properties and town; it acknowledged the existence of a footbridge on Nissen's property; and it found that Nissen used one particular road. Thus, all of the evidence pointed to the existence of a publicly used land route between the Nissen homestead and town.

Shultz also offered a number of common law theories to support his position that the Army took land burdened by preexisting rights. The district court made no factual finding, however, that would support the conclusion that no public prescriptive easement was established by 1937. All of the evidence was to the contrary.

Quiet title claims against the United States are subject to a

12-year statute of limitations from the date on which the claimant knew or should have known of his claim. Only when present day patterns of travel across the base are interfered with is it proper to charge individuals with knowledge of the government's claim over the route. Prior to 1981, no "uncontroverted" notice alerted civilians that their right of passage was in jeopardy. Thus, Shultz was not barred from bringing the quiet title action.

COUNSEL

Joseph W. Sheehan, Fairbanks, Alaska, for the plaintiff-appellant.

William B. Lazarus, United States Department of Justice, Environment & Natural Resources Division, Washington, D.C., for the defendant-appellee.

OPINION

FLETCHER, Circuit Judge:

Paul G. Shultz appeals the district court's judgment in favor of the government in his action to quiet title under 28 U.S.C. § 2409a to a public right (or rights) of way across Fort Wainwright. He argues that the district court erred in finding that no rights of way existed within the meaning of 43 U.S.C. § 932 ("RS 2477 rights of way"),[1] or that, if they did exist, his cause of action, nonetheless, was barred under 28 U.S.C. § 2409a(g) (the statute of limitations for quiet title actions). In the alternative, Shultz contends that even if no RS 2477 right of

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1. 43 U.S.C. § 932 reclassified R.S. 2477 as first enacted by the Act of July 26, 1866, Ch. 262. § 8, 14 Stat. 251, 253 (1866) (repealed 1976).

way existed prior to the Army's acquisition of land, the Army took the land subject to other forms of easements that provided public passage. The district court had jurisdiction under 28 U.S.C. § 2409a (Quiet Title) and 28 U.S.C. § 1331 (Federal Question). Our jurisdiction rests on 28 U.S.C. § 1291 (Final Judgments).[2]

As a threshold matter, the Army appears to press a challenge to the district court's jurisdiction by questioning Shultz's standing to litigate all but the roads abutting his property. Tr. I at 28, 30. It disputes whether Shultz has a "special and vital interest" in roads that do not abut his property. *See State v. Nolan*, 191 P. 150 (Mont. 1920); *see also Hudson v. American Oil Co.*, 152 F. Supp. 757, 767-68 (E.D. Va. 1957), *aff'd* 253 F.2d 27 (4th Cir. 1958) ("[a]s complainants are not abutting landowners, it is difficult to conceive how any special injury may be shown, as contrasted with an injury to the general public"); *Wernberg v. State*, 516 P.2d 1191, 1201 (Alaska 1974) ("a landowner has a private property right of access to an abutting public street"). The argument is without merit. Shultz clearly meets the criteria for standing outlined in *Lujan v. Defenders of Wildlife*, 112 S. Ct. 2130, 2136 (1992). *See also Central Arizona Water Cons. Dist. v. EPA*, 990 F.2d 1531, 1537 (9th Cir. 1993). First, he has a "particularized" interest in crossing the base to reach roads that lead to his property. Not to have access to those roads would "affect [him] in a personal and individual way" by sealing him off from his property. *Lujan*, 112 S. Ct. at 2136 n.l. Second,

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2. Shultz filed two notices of appeal. The first, docketed as No. 92-35197, appealed the district court's judgment of January 13, 1992. The second, No. 92-35580, appealed the amount of costs assessed against him by the district court's clerk. We make no determination regarding our jurisdiction to hear Shultz's costs appeal. Our decision renders that appeal moot.

Shultz seeks to quiet title as against the Army which asserts an unrestricted right to regulate access to Fort Wainwright's roads.[3] A clear causal connection exists between his claim and the restrictions he challenges. Finally, were Shultz able to prove that the combination of roads leading to his property do constitute public rights of way the "favorable decision" would redress the injury he asserts. The district court correctly permitted the record to be developed fully.

A district court's factual findings are reviewed for clear error. Fed. R. Civ. P. 52(a). Its conclusions of law are subject to de nova review. Factual findings and conclusions concerning the events that may trigger the running of the statute of limitations present "a mixed question of fact and law reviewed for clear error." *Shultz,* 886 F.2d at 1159. We must accept the district court's factual findings unless upon reviewing "the entire evidence [the court] is left with the definite and firm conviction that a mistake has been committed." *Anderson v. City of Bessemer,* 470 U.S. 564, 573 (1985); *United States v. Ramos,* 923 F.2d 1346, 1356 (9th Cir. 1991).

I.

Shultz owns property to the northeast of Fort Wainwright and east of Fairbanks. To get to Fairbanks, he must cross the base. Fort Wainwright is situated on land acquired by the federal government in a series of purchases and withdrawals beginning in 1937. All of the acquisitions were made "subject to valid existing rights." Shultz traces his title through George Nissen

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3. In a letter of August 24, 1991, the Acting Provost Marshall of Fort Wainwright threatened to bar Shultz from crossing the base. Defendant's Exhibit AQ ("Any deviation from this route or procedures without prior approval will result in total barment from post").

who homesteaded in the first half of the century and through Nissen's successors. Nissen was a German immigrant who made entry on the property in October 1907, built his cabin the following month and, by February 1908, established residency. He was among a handful of homesteaders occupying land along the Chena River and for a while raised potatoes and other vegetables with great success. He transported a portion of his crop to market in Fairbanks every year. Nissen left the area in 1918. The homestead patent, for which he had filed in 1914, was issued in 1924.

In the early days of homesteading the routes to Fairbanks across present-day Fort Wainwright were difficult to travel. At trial one witness described swimming horses in the summer across sloughs lacking bridges. These same sloughs served as frozen highways in the winter. Much of the land surrounding Shultz's property, especially to the north, is swampy, due to the underlying permafrost that prevents the melted snow from draining. In Alaska, more than in most locations, the season dictates the nature and means of passage. The trial involved the introduction of extensive evidence of the various historical routes across the land now occupied by the Army. The routes particularly examined by the district court essentially follow along two physical features of the land, the Chena River to the south, and the hills (Beacon, Bald, Sage) to the north. Trainer Gate Road feeds into the network from Fairbanks. River Road, also known as Tank Road, continues from Trainer Road along the northern bank of the Chena River, ultimately to Homestead Road which leads to Shultz's property. These roads make up the modern route that follows roughly the river from Fairbanks across Fort Wainwright.[4] In part they follow the same course as

4. The parties disagreed at trial and again on appeal as to how to describe and name the roads making up this route. The district court

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the trails and wood paths used by early settlers in the Chena River area. While roads skirting the hills to the north also afforded settlers access to Fairbanks, only the river route is travelled today.

In 1981 the Army instituted a pass system for vehicles entering or crossing the base, requiring passes at Trainer Gate Road. When Shultz did not present a pass, the Army refused him entry. No other land route is available. Without access through Fort Wainwright, Shultz is landlocked. Hemmed in by Fort Wainwright to the east and the Chena River to the south, the property cannot be developed or subdivided.

Shultz filed a complaint in 1986 seeking access across Fort Wainwright as a matter of right. (First Amended Complaint). The district court granted the Army summary judgment on statute of limitations grounds, 43 U.S.C. § 2409a(g). We reversed and remanded. *Shultz v. Department of Army,* 886 F.2d 1157 (9th Cir. 1989). We concluded that further factual development was required to determine whether the statute of limitations had run on Shultz's quiet title action. *Id.* at 1161. On remand, the judge held a bench trial during which he questioned the parties' expert witnesses extensively, and pored over maps of the area as they were explained to him. Ultimately finding that none of the six roads Shultz put forward were RS 2477 public rights of way, or

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made separate findings regarding Wiest Road, which no longer forms a distinct part of the Trainer-River-Homestead Roads network. District Court's Findings (DCF) 7-24. On cross-examination, a government witness explained that River Road makes a bend north of the Chena river and "Homestead Road . . . takes off from that bend and goes to the east." Tr. 111 at 97. A sign marked "Homestead Road" stands at the intersection. *Id.*

public easements otherwise established, the district court entered judgment in favor of the Army. He also found that the quiet title actions on four of the roads were barred by Section 2409a(g). Shultz appealed.[5]

II.

The Army withdrew the land now occupied by Fort Wainwright "subject to valid existing rights" including any then — existing easements. *Shultz*, 886 F.2d at 1159. Before the district court, Shultz sought to show that an easement, whether of RS 2477 or common law origin, predated the Army's acquisition of the Fort Wainwright landholding. He argued that under one theory or another, or several combined, he was entitled to cross the base to reach his property.

We must determine whether the district court was correct in holding that the property owners who must cross Fort Wainwright to reach their property have no right of passage either because none existed at the time of the Army's acquisition of the military reserve or because the Army's subsequent actions cut off the right. Our decision must take into account the fact that conditions in Alaska present unique questions, not easily answered.

Due to its geography, its weather, and its sparse and scattered population, Alaska's "highways" frequently have been no more than trails[6] and they have moved with the season and the purpose for the transit — what travelled best in winter could

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5. *See supra* note 2.

6. *See* R.S. 15.45.001(9).

be impassable knee-deep swamp in summer; what best accommodated a sled was not the best route for a wagon or a horse or a person with a pack. By necessity routes shifted as the seasons shifted and as the uses shifted. What might be considered sporadic use in another context would be consistent or constant use in Alaska. We conclude that as long as the termini of the right of way are fixed (the homesteaders' cabins on one end, Fairbanks on the other), to establish public right of way the route in between need not be absolutely fixed (as it might be in other settings). The law recognizes as much. Based on that premise, the questions we must decide are: (1) was there evidence that the homesteaders' usual routes between Fairbanks and the homesteads in 1937 lay across the land that was acquired for Fort Wainwright? (2) If so, did the Army take action and take it at a time that has cut off their right to use the routes? We note that the Army and its residents east of the base have coexisted for several decades. Everyone appears satisfied with the single route currently used by the public to cross the base. Right of access is the issue, not the route. A decision finding a public right of way to cross Fort Wainwright, though grounded in the recognition of various historical routes, should not preclude a limitation on that right to the single recognized route currently in use.

With this preamble in mind, we turn to the district court's legal analysis and its application to the evidence.

A. *RS 2477 Right of Way*

From 1866 until its repeal, 43 U.S.C. § 932 (R.S. 2477) granted a "right of way for the construction of highways over public lands, not reserved for public uses." 43 U.S.C. § 932 *repealed by* Federal Land Policy Management Act of 1976,

§ 706(a), Pub. L. No. 94-579, 90 Stat. 2793.[7] The grant is "self-executing." *Standard Ventures, Inc. v. Arizona*, 499 F.2d 248, 250 (9th Cir. 1974); *see also Sierra Club v. Hodel*, 848 F.2d 1068, 1083-84 (10th Cir. 1988). An RS 2477 right of way comes into existence "automatically when a public highway [is] established across public lands in accordance with the law of the state." *Standard Ventures*, 499 F.2d at 250; *see also Sierra Club*, 848 F.2d at 1078 (citing 43 C.F.R. § 244.55 (1939)). Whether a right of way has been established is a question of state law. *Standard Ventures*, 499 F.2d at 250; *Fisher v. Golden Valley Elec. Ass'n, Inc.*, 658 P.2d 127, 130 (Alaska 1983) (citing *United States v. Oklahoma Gas & Elec.* Co., 318 U.S. 206, 209-10 (1943)). The resolution of any particular claim turns upon a highly factual inquiry. *Standard Ventures*, 499 F.2d at 250. "Any doubt as to the extent of the grant must be resolved in the government's favor." *Humboldt County v. United States*, 684 F.2d 1276, 1280-81 (9th Cir. 1982).[8]

Under Alaska law, two methods of establishing an RS 2477 right of way have been recognized:

> [B]efore a highway may be created, there must either be [1] some positive act on the part of the appropriate public authorities of the state, clearly manifesting an intent to accept the grant, or [2] there must be public user for such a period of time and under such conditions as to prove that the grant has been accepted.

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7. All rights of way existing on the date of repeal were expressly preserved. 43 U.S.C. §1769.

8. The scope of an RS 2477 grant is also subject to state law. *Sierra Club*, 848 F.2d at 1079-83.

Hamerly v. Denton, 359 P.2d 121, 123 (Alaska 1961); *see also Dillingham Commercial Co., Inc. v. City of Dillingham*, 705 P.2d 410, 413-14 (Alaska 1985); *Alaska v. Alaska Land Title Ass'n*, 667 P.2d 714, 722 (Alaska 1983); *Girves v. Kenai Peninsula Borough*, 536 P.2d 1221, 1226 (Alaska 1975), *overruled on other grounds*, 618 P.2d 567, 569 n.4 (Alaska 1980). To prove RS 2477 rights by the second of these methods, a claimant must show "(1) that the alleged highway was located 'over public lands,' and (2) that the character of its use was such as to constitute acceptance by the public of the statutory grant." *Hamerly*, 359 P.2d at 123.

Alaska law, consistent with Alaska's circumstances, does not place a burdensome requirement on RS 2477 claimants regarding the nature of the "highway," whether established by dedication or public use. It broadly defines "highway" to include a "road, street, trail, walk, bridge, tunnel, drainage structure and other similar or related structure or facility, and right-of-way thereof." A.S. 19.45.001(9) (1988); cf. 48 U.S.C. § 321d (repealed 1959) (similar definition). It is necessary to establish that the road traverses public land because an RS 2477 right of way may be created only while the "surrounding land [retains] its public character." *Adams v. United States*, No. 91-16762, slip op. at 9366 n.1 (9th Cir. Aug. 31, 1993); *see also Humboldt County*, 684 F.2d at 1281.

> If the conditions were such that the lands were not public lands — having been taken up under homestead applications — then the congressional grant was not in effect. Public use of the road would be of no avail since there would be at that time no offer which the public could accept. The fact that the entries were later relinquished or cancelled would not change the condition[s].

Hamerly, 359 P.2d at 124; *see also Dillingham*, 705 P.2d at 414. Valid pre-existing claims upon the land traversed by an alleged right of way trump any RS 2477 claim. As the *Dillingham* court put it, "[i]t is clear that the public may not, pursuant to § 932 acquire a right of way over lands that have been validly entered." *Dillingham*, 705 P.2d at 414. Homesteading rights clearly are superior to later established RS 2477 claims. Territory validly withdrawn for other purposes also falls within the *Dillingham* rule. Thus, when Congress set aside land for the support of territorial schools, the sections it named from each township no longer were available public lands. Act of March 4, 1915, ch. 181, §§ 1-2, 38 Stat. 1214, 48 U.S.C. § 353 (repealed by Pub. L. No. 85-508, § 6(k), 73 Stat. 343 (1958)) (withdrawing all township sections numbered 16 and 36 for schools unless "settlement with a view to homestead entry ha[rd] been made upon any part of the sections reserved hereby before the survey thereof in the field"). *Cf. Mercer v. Yutan Constr. Co.*, 420 P.2d 323, 324, 325-26 (Alaska 1966) (grazing land "public" because grazing permit subordinate to public right of way).

The *Hamerly* line of cases sets the standard for the other condition: whether a trail has been frequented by "public users for such a period of time and under such conditions as to prove" that a public right of way has come into existence. *Hamerly*, 359 P.2d at 123; *see also Dillingham*, 705 P.2d at 413-14; *Alaska Land Title*, 667 P.2d at 722; *Girves*, 536 P.2d at 1226. Continuous use is not a requirement. *Cf. McGill v. Wahl*, 839 P.2d 393, 397 (Alaska 1992) ("[t]o establish a proscriptive easement a party must prove that (1) the use of the easement was continuous and uninterrupted"). Although the law of RS 2477 rights of way suggests that "infrequent and sporadic" use is insufficient, *Hamerly*, 359 P.2d at 125, and that "regular" and "common" use by the public is necessary, *Kirk v. Schultz*, 110 P.2d 266,

268 (Idaho 1941), and that travel across the route may not be "merely occasional," the test is what is "substantial" *under the circumstances, Ball v. Stephens,* 158 P.2d 207, 210 (Cal. 1945). Courts must look to the circumstances as they existed at the time of establishment. In California, a court noted that "travel over [a claimed RS 2477 right of way] . . . was irregular but that was due to the nature of the country and to the fact that only a limited number of people had occasion to go that way." *Ball,* 158 P.2d at 211. Such circumstances are not unlike Alaska's where we conclude a few homesteaders traversing difficult terrain, in difficult climatic conditions may lay claim to an RS 2477. An existing right of way recognized as such, primitive at its conception, may evolve from trail to road as frontier conditions give way to modernization. *Id.* at 210 ("[t]he route was used first as a trail, later by horse-drawn vehicles, and went through a gradual process of occasional improvement and use until it became a road suitable for automobiles and trucks"). The route, no matter how rudimentary must, however, for RS 2477 purposes, have "definite termini." *Dillingham,* 705 P.2d at 414. Trails "running into wild, unenclosed and uncultivated country" do not meet the minimum standard of definiteness (they lack one terminus) nor do they suggest sufficient public use. *Id.* In rejecting claims arising from "desultory" use, the Alaska Supreme Court was influenced by the fact that those particular claimants "had no real interest in lands to which [their claimed RS 2477] gave access." *Hamerly,* 359 P.2d at 125.

The district court in this case found that Homestead Road[9]

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9. The parties disagree over how to name or specify this road, *see supra* note 4. Shultz asserts that Homestead and Wiest Roads must be considered together because they coincide in places or run into each other. Appellant's Opening Br. at 20, 31-32; Tr. I at 4; *see also* Respondent's Br. at 23. The district court found that the two roads do nor "correspond

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did not amount to an RS 2477 right of way because no road broad enough to accommodate a wagon cut across present day Fort Wainwright before the surrounding land was validly withdrawn from the public domain. DCF 29, 36, 39, 41. Whether factually correct or not, the court imposed an overly stringent standard. An otherwise qualifying trail is all that would be required. Further, to reach this conclusion the district court drew some impermissible inferences. It frequently pointed out that Nissen used the river to transport his crops rather than using an overland trail and, apparently, inferred from this that no trail existed. DCF 2X, 40; *see also* Tr. V at 68. It noted that Nissen, like some other neighboring homesteaders, built his cabin on the river and that the river, in contrast to the alternative available land routes, was the most convenient, and the only viable means to transport his crop to market. DCF 28, 33, 40.

Even under the deferential standard of review due to the finder of fact, we cannot agree that sufficient evidence supports either inference — that Nissen used the river to transport his crop or that there was no overland trail. There was no evidence that Nissen owned a boat or that he ever travelled by boat. The Government Land Office's on-site investigation of his homesteading claim reported no boat or dock on the property. It

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. . . or overlap" and treated them separately. DCF 23; *but see* DCF 36. Since the law recognizes that routes may evolve, *Ball, 158* P.2d at 210, there is no requirement that the historical route and its current location coincide exactly. Here, parts of the historical road were "obliterated" by the construction of the modem throughway. Tr. 111 at 137; Tr. IV at 69. Other parts of the road disappeared in the face of an encroaching Chena River. Tr. IV at 69-70. Particularly in Alaska, it makes little sense to insist on a formal identity between the modern and historical routes. The judge's factual findings regarding the precise relationship between the trail Nissen took and modern Homestead Road are irrelevant under the law.

did report that he had a stable, suggesting he owned a horse. A neighbor across the river said that he himself did not have a boat. There was evidence that Nissen possessed a "garden truck." The Chena River flows downstream into Fairbanks, and is very shallow in places. To return upstream seven "river miles" from Fairbanks is problematic. Tr. V at 50. While the district court's inference relies on "the convenience of down river travel," the court acknowledged that the upriver return would be taxing. DCF 28; Tr. V at 50, 68.

The district court's factual findings regarding lack of overland transport, travel and trail at best are based on supposition, not permissible inference from fact. This obviously contributed to its erroneous legal conclusions. But entirely apart from the erroneous factual findings, it misunderstood the requirements to establish a public right of way. The district court seemed to think the transportation of crops, and use of a wagon were crucial to establishing an RS 2477 right of way. In analyzing Nissen's *use* of Wiest Road, it noted that the use was "not for regular transport of his crops." DCF 38. As a legal matter, the barest foot trail may qualify for RS 2477 status. A.S. 19.45.001(9) (1988); *Ball,* 158 P.2d at 210 (mountain trail). The condition of the "highway" — whether paved and wagon-worthy, or simply a "minor footpath" — is irrelevant if the claimant can show that the right of way was used no matter for what purpose. A handful of homesteaders pushing the boundaries of the Alaskan frontier in inhospitable territory put a path to substantial use merely by traveling to and from town and each other's homesteads. *Ball,* 158 P.2d at 211; *see also Dillingham,* 705 P.2d at 415 (road "may be used for *any* purpose consistent with public travel") (emphasis added).[10] Even if Nissen did not use

10. The Army's brief highlights one of the legal confusions at play in this case. It argues that "[t]here plainly is no basis for concluding that (Cont'd)

the trail to carry his vegetables into market by wagon, there can be no doubt that he had a "real interest in the lands to which [a trail] gave access," a route between his home, a homesteader's lot under cultivation (not wild country), and Fairbanks, the nearest outpost of civilization. *Hamerly,* 359 P.2d at 125. The right of way was no less a right of way early on because only later it evolved to accommodate wagons and cars (¶¶ 39, 41. 37). As we have noted the *manner* of travel (by foot or beast or vehicle) is legally irrelevant to the RS 2477 determination. What matters is that there was travel between two definite points.[11]

To the extent that the district court's findings collectively suggest that overland travel was so inconvenient as to justify the conclusion that travel was by river only, the conclusion is based on sheer supposition, not evidence, circumstantial or otherwise. The conclusion may be driven in part by the erroneous legal requirement superimposed on the facts. The record discloses that Nissen had available land routes to take his produce to market by wagon, by sled, by cart or on his back. He

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there was a road to Nissen's property through Wiest's property that predated Wiest's homestead, given that Wiest himself had to build three miles of road to his homesteads." Respondent's Brief at 29. Both the judge and the Army clearly misunderstood the import of A.S. 19.45.001(9) for RS 2477 law. Such a right of way need not be "buil[t]" or "constructed" (DCF 41). Nor need it be "susceptible to wagon or motor vehicle use" (DCF 39). An unimproved, unpaved trail suffices as a "road" for the purposes of this law.

11. The government posed the problem incorrectly. It argued to the court that "if you're going to find an RS-2477, you have to know not only *that* he got from Fairbanks to his property, but *how* he did it." Tr. V at 79 (emphasis added). As long as it is clear that Nissen traveled overland, how he did it is immaterial.

could avoid crossing the Columbia Slough which lay between the Wiest and Nissen homesteads by taking passage around Approach Hill and there were means even across the slough, over the ice in winter, swimming horses in summer. Why his taking produce to market by wagon should be critical to the establishment of an RS 2477 right of way is never explained, simply assumed.

The court makes a curious finding that simple use (the threshold requirement for RS 2477 claims) of *one* of the overland trails—Wiest Road—did not occur until around 1918, some 11 years after Nissen entered his homestead (DCF 36). The court does not make the finding that there was *no* overland travel before 1918, only that "[*b*]*y 1918,* Nissen sometimes *used Wiest Road to* get to Fairbanks, but not for regular transport of his crops." (DCF 36) (emphasis added). Wiest arrived in 1910 and built three miles of road sometime over the next several years. Obviously, Nissen's overland travel would have involved a trail that predated the Wiest Road since he arrived in 1907. The district court's finding does not support an inference that he traveled by river, nor does it justify the presumption that no trail existed.[12]

This is not a case where "[t]here simply was no evidence that would have allowed the [district] court to conclude that before [1937] the public used [historical trails] in such a manner as to accept the § 932 grant." *Dillingham,* 705 P.2d at 415. The evidence was to the contrary. The district court's own factual findings establish that a trail was established in the early days of Nissen's residency. The district court acknowledged the presence of a significant number of homesteaders along the

12. This inference of course was critical to the court's holding that no right of way existed. "No road, no R.O.W." was the logic.

Chena River (DCF 12) all of whom presumably made their way back and forth between each others' properties and town.[13] It acknowledged the existence of a footbridge on Nissen's property suggesting a foot trail (DCF 35) leading west to Fairbanks. Tr. III at 10-11. Indeed, in the face of numerous affidavits noting frequent travel,[14] the district court found that Nissen *used* Wiest Road (DCF 36); he just thought it *inadequate use* occurring too late. The district court never found that no trail or road existed during the critical time.[15] What it did find — that Nissen used

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13. The government's own witness drew an apt inference while testifying regarding the existence of trails. "No surprise there," he observed, "wherever we see buildings, we see a trail coming." Tr. III at 153.

14. The judge questioned counsel for the Army on this point. The answer he received supported the affidavits as to both overland travel and public use.

> Court: What do you make of the testimony by Sabin that he frequently saw Nissen coming and going?
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> Mr. Landon: I don't doubt that. And, I would say that he likely, and not necessarily all that infrequently, went to town .... [I]t's not impossible that he walked to town, the distance isn't that great .... [H]e could have easily ridden to town .... [or] mushed [by dogsled] to town.

Tr. V at 70.

15. Everything in the record supports the fact there was a trail and that the trail Nissen allegedly used was passable year-round. Tr. II at 90. Nothing is inconsistent with it. At the very least the Columbia slough could be swum in summer, the ice traversed in winter (DCF 31). The finding that no bridge could be detected in the 1938 aerial photographs

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the river to transport his crops and that he did not use one of the roads until 1918 — has no foundation in the record. All the evidence points to the existence of a publicly used land route between the Nissen homestead and town.

Our analysis, however, cannot end simply with the conclusion that the publicly used route existed. To qualify as an RS 2477 the route must have crossed public land, not withdrawn or reserved prior to its establishment.[16] The court found that the territorial schools reservation of 1915 and Wiest's filing of a homestead application in 1914 withdrew from the public domain

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(Cont'd)
(DCF 29) is not inconsistent with Shultz's assertion that one likely existed prior to Nissen's departure in 1918. Parts of the record created by the Army establish that bridges can be washed out. Defendant's Exhibit DV (noting bridge washed out in the spring). The settler who swam his horses across the slough testified to doing so after 1918 (DCF 31). If a bridge did afford convenient passage across the slough with a wagon (DCF 33), no other finding precludes the possibility that such travel occurred. It may be true that no evidence of a "clear" wagon road was visible on the 1938 aerial photograph, but nothing in the record precludes this finding.

The judge did find that "[i]f a trail or road had existed to Nissen's homestead in 1911, it is unlikely that the section line calls of the survey . . . would have missed it." (DCF 38). However, the very witness testifying to the reliability of call lines acknowledged that there could be a "minor footpath . . . that was very hard to see, it's possible to miss." Tr. III at 141-42. He only assured the judge that "major roads" would unlikely go unnoticed by surveyors walking the section lines. *Id.* at 141. As Shultz pointed out, the call notes missed other established routes. TR. V at 145.

16. Under *Hamerly* and *Dillingham*, a claimant has a limited time frame in which to prove use. *Hamerly*, 359 P.2d at 123-25 (analyzing "gaps in the possession of the land"); *see also Dillingham*, 705 P.2d at 414 (applying *Hamerly* analysis).

a segment of the land through which the trail passed. DCF 43, 44. These findings do not preclude an RS 2477 right of way from earlier vesting or affect the existence of other parts of an RS 2477 along other parts of the trail. Specifically, they do not preclude a determination that Nissen made sufficient use of the overland trail in the window of time available to him to establish an RS 2477 superior (because prior in time) to either the territorial schools' reservation or Wiest's homesteading rights.[17]

We do not suggest that every segment of the trail qualified for RS 2477 status, either because a homesteading claim clearly displaced that portion of the claimed RS 2477 right of way,[18] or because there might be homesteading rights that would trump an RS 2477 claim.[19] But that concession does not justify the

17. The district court's findings suggest that the gap closed no later than 1914 when Wiest filed his homesteading claim. Under Alaska law, land is withdrawn from the public domain when a homesteader enters his homestead, not when he files his claim or receives the patent. *Hamerly*, 359 P.2d at 123 ("[w]hen a citizen has made a valid entry under the homestead laws, the portion covered by the entry is then segregated from the public domain"); *Dillingham*, 705 P.2d at 414 (citing *Hamerly* rule); *see also Alaska Land Title*, 667 P.2d at 723 ("the homestead entry of [a claimant's] predecessor . . . fixes the date from which the property rights of the owners of the parcel are to be measured") (rule applied to fixing of private property rights, not consideration of RS 2477 withdrawal from public domain). Since Nissen came on the land in 1907, and Wiest entered in 1910, Nissen had at least three years in which to establish an RS 2477 trail over that segment of the route crossing Wiest's land. *See* Defendant's Exhibit DH, Supp. ER-DH (showing Nissen's entry in 1907, Wiest's in 1910, and Sabin's in 1911).

18. For example, Nissen did not establish an RS 2477 over the land entered by homesteader Adelman prior to Nissen's arrival.

19. There may be prior homestead entries in the section to which

(Cont'd)

district court's blanket finding that no RS 2477 existed across present-day Fort Wainwright.

B. *Other Easements*

For Shultz to prove that the Army took possession of Fort Wainwright subject to other existing property rights, does not require him to prove that the right of way he asserts against the Army is wholly based on one property law theory or another. *See Dillingham,* 705 P.2d at 413. All he was obliged to show was that the homesteaders to the east of Fairbanks used as a matter of right some road, trail or footpath to cross the land before it was acquired by the Army.

Shultz offered a number of common law theories to support his position that the Army took land burdened by preexisting rights. In response on formulating his ultimate legal conclusions the district court determined that Shultz had." failed to prove the existence of any RS 2477 right-of-way *or other right-of-way* across Fort Wainwright which either alone or in combination with other rights-of-way provide access to [his] property." DCF 91 (emphasis added). As to other possible bases for a right of way, this finding amounts to little more than a declaration. We can identify no factual finding, for example, that would support the conclusion that no public prescriptive easement was established by 1937.[20] All the evidence is to the contrary.

(Cont'd)

we have no map of homestead rights. Also, the entry dates noted on Exhibit J and recited by the judge in his findings, DCF 42-44, may not reflect all the entrymen with superior claims.

20. Shultz does not suggest that he has a prescriptive easement against the government based on use occurring *after* the Army acquired

(Cont'd)

Appendix B

Under Alaska law "public easements may be acquired by prescription." *Dillingham,* 705 P.2d at 416 (citing 2 J. Grimes, *Thompson on Real Property* § 342, at 209 (1980)). "To establish a prescriptive easement a party must prove that (1) the use of the easement was continuous and uninterrupted; (2) the user acted as if he or she were the owner and not merely one acting with the permission of the owner; and (3) the use was reasonably visible to the record owner." *McGill v. Wahl,* 839 P.2d 393, 397 (Alaska 1992) (citing *Swift v. Kniffen,* 706 P.2d 296, 302 (Alaska 1985)). "[A] claimant must show essentially the same elements as for adverse possession." *Swift,* 706 P.2d at 302.[21] He must overcome the presumption that "[w]hen [he] enters into possession or use of another's property, there is a presumption that he does so with the owner's permission and in subordination to his title." *Hamerly,* 359 P.2d at 129; *see also McGill,* 839 P.2d at 397. "Use alone for the statutory period" is insufficient. *Hamerly,* 359 P.2d at 129. "The use must be open, notorious, adverse, hostile, and continuous." *Dillingham,* 705 P.2d at 416. The purpose of these requirements is "to put the record owner on notice of the existence of an adverse claimant." *Swift,* 706 P.2d at 302. In some cases, a private permissive easement may become prescriptive if it "was for many years the only means of passage [through] the dominant estate." *McGill,* 839 P.2d at 398. The fact that the easement is shared does not defeat the claim because "[i]t would not be expected that an easement holder

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(Cont'd)
the Fort Wainwright land. *See* 3 *Powell on Property* ¶ 413 at 34-136-8 to 34-137 (describing theoretical difficulty); 28 U.S.C. § 2409a(n) (Quiet Title Act not to be construed to permit suits based on adverse possession).

21. Public prescriptive easements involve the public "use, not possession of land." *Jesse Dukeminier & James E. Krier, Property* 860 (2d ed. 1988); *see also Dillingham,* 705 P.2d at 4145 (discussing distinction between use and possession).

would object to traffic on or use of that part of a roadway which did not interfere with its [sic] [the easement holder's] use." *Id.*

At the time Nissen and other homesteaders fanned out along the Chena River east of Fairbanks, the trail roughly following the river[22] appears to have been one of the few routes passable year-round. The affidavits in support of Nissen's homesteading claim make it clear that these residents often travelled between homesteads. The Army seizes on the neighborly nature of the visits to dispute Shultz's proof of prescriptive use. It suggests that Shultz has not overcome the presumption that the routes were used by permission. The Army misunderstands the adversity criterion. To assert a public easement by prescription, the public need only act "as if [it] were claiming a permanent right to the easement." *Swift,* 706 P.2d 296. Since overland travel to Fairbanks from the homesteads east of the base clearly required some kind of right of way, all interested parties were on notice that an easement was being established. *See id.; McGill,* 839 P.2d at 398. Moreover, the public nature of the route, and its shared use, reinforce Shultz's claim that at the very least an easement by prescription took hold. The route was there. The homesteaders used it. No one challenged their right.

III.

Statute of Limitations

In addition to finding that no right of way existed, the district court held Shultz's action barred under 28 U.S.C. § 2409a(g). DCF 20, 60, 75, 78. Even though a public right of way across Fort Wainwright existed in 1937, the right is subject to defeat by the statute of limitations provision of the Quiet Title Act.

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22. *See supra* note 4.

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Quiet title claims against the United States are subject to a 12-year statute of limitations from the date on which the claimant "knew or should have known of the claim of the United States." 28 U.S.C. § 2409a(g). A statute of limitations defense in this context is jurisdictional. *Park County v. United States*, 626 F.2d 718, 720 (9th Cir. 1980). The limitation must be strictly construed in favor of the government. *Shultz*, 886 F.2d at 1159. Federal law applies. *Hawaii v. United States*, 866 F.2d 313 (9th Cir. 1989).

A quiet title action will "be deemed to have accrued" at the time a claimant received or had actual or constructive notice of the United States' claim on the land. *D.C. Transit System, Inc. v. United States*, 531 F. Supp. 808, 810-11 (D. D.C. 1982), *aff'd*, 790 F.2d 964 (D.C. Cir. 1986). "The existence of one uncontroverted instance of notice suffices to trigger the limitations period." *Nevada v. United States*, 721 F.2d 633, 635 (9th Cir. 1984). Any action sufficient to "excite attention and put the party on guard" provides adequate notice. *D.C. Transit System*, 531 F. Supp. at 812. Nevertheless, "when the United States' claim is vague and ambiguous," the limitations period does not begin to run. *Shultz*, 886 F.2d at 1160. In addition, "[i]f the government . . . apparently abandon[s] any claim it once asserted, and then . . . reasserts a claim, the later assertion is a new claim and the statute of limitations for an action based on that claim accrues when it is asserted." *Id.* at 1161. We apply a reasonableness test. *Id.* at 1160.

Shultz filed his complaint in 1986. Unless the government apparently abandoned an interest in the right of way he seeks, he is barred from asserting a claim to roads as to which he received notice of the Army's claim of right to restrict access prior to 1974. We limit our consideration of Shultz's right to

maintain his action to the easement he seeks across the Homestead, River and Tank Roads, the route currently used by the public to cross the base. The district court found that a section of Wiest Road, which formed part of the historical route taken by homesteaders, had been obstructed by the Fort Wainwright landfill, thus barring Shultz's claim to the roadway. Shultz responds that whatever obstruction to the historical route this landfill represents, it does not in fact obstruct the modern right of way across the base. One continuous route exists. Apart from the restrictions imposed by the permitting system initiated in 1981, the route has always provided unobstructed through passage across the base to the public.

We agree with Shultz's analysis. When a modern route is open, the fact that an Army facility is placed over an historical route, one no longer forming part of the network of roads that link Fairbanks with the communities east of the base, is insufficient to "excite attention" or put civilians "on guard" that their right to cross the military installation has been challenged. It would not be reasonable to require civilians to monitor the Army's obstruction of historical routes in order to preserve the right to use the modern throughway. *Shultz,* 886 F.2d at 1160. Only when present day patterns of travel across the base are interfered with is it proper to charge individuals with the knowledge of the government's claim over that route. Prior to 1981, it appears no "uncontroverted instance[ ] of notice," *Nevada,* 731 F.2d at 635, served to alert civilians that their right of passage, preserved by the proviso to the Army's acquisition of the land, was in jeopardy.

In other circumstances, we have found the "mere[ ] assert[ion] [of] some federal authority over a backroad" enough to bar a quiet title action because it constituted sufficient public

notice. *Nevada*, 731 F.2d at 635 (discussing *Park County*, 626 F.2d at 720-21 ("single sign" adequate notice)). We cannot apply the same reasoning here. Those crossing the base subject themselves to federal authority simply by entering the installation. That the Army occupies Fort Wainwright and maintains its roads is not enough "warning" that it has displaced the rights expressly reserved for the public in its title. We conclude that Shultz is not barred from bringing his quiet title action.

VI.

We agree with the district court that this case turns on a simple inquiry: "to see that [a] road was in existence before the dedication for Fort Wainwright, and that it wasn't blocked until the 1981 period." Tr. I at 89.[23] A homesteaders' access trail — their right of way — was in existence within the meaning of Alaska law before the army took possession of the base. The early homesteaders' route became the road now known as Homestead Road. This is the same route Shultz and his neighbors travelled without obstruction before the Army instituted the system of permits.[24] Left with the definite impression that a mistake has been made, we reverse. We hold that Shultz established that a right of way existed prior to the Army's withdrawal of the land and that it has not been obstructed at a time or in any manner that triggered the applicable statute of limitations provision.

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23. Shultz filed his complaint in 1986. The statute of limitations is triggered by notice given prior to 1974. 28 U.S.C. § 2409a(g) (12 years).

24. To require a permit, for example, for identification or proof of competence to operate a vehicle is not necessarily to obstruct passage. It may constitute regulation perfectly consistent with the public's essential right of passage. *See infra* note 25.

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The Army took possession of its Fort Wainwright landholding burdened by the rights of local homesteaders to use of a right-of-way that connected the lots to the east of the base with Fairbanks. It cannot now claim that the users of the modern day roadways cross "merely with [its] permission." *Cf. McGill*, 839 P.2d at 398.[25]

REVERSED.

The appeal relating to costs, No. 92-35580, is dismissed as moot.

DISMISSED.

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25. Shultz has not argued, nor do we suggest, that the Army may not regulate the "*manner* of [his] use" of a roadway. *United States v. Vogler*, 859 F.2d 638, 642 (9th Cir. 1988). Rather he insists that the critical question posed by this case is whether the Army may restrict his *access* to a roadway, whether it may, as a matter of discretion or of right, exclude him altogether from its network of roads traversing the base. Having found that Shultz is entitled to cross Fort Wainwright, we note, however, that the Army may reasonably regulate his passage. *See Adams v. United States*, No. 91-16762, slip op. at 9366 n.1 (9th Cir. Aug. 31, 1993) (easement under RS 2477 no bar to reasonable Forest Service regulations).

APPENDIX C — FINAL JUDGMENT OF THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF ALASKA FILED JANUARY 13, 1992

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ALASKA

Case No. F86-030 Civil

PAUL G. SHULTZ,

Plaintiff,

v.

DEPARTMENT OF ARMY, UNITED STATES OF AMERICA,

Defendant.

FINAL JUDGMENT

This matter having been tried before this court, it is hereby ORDERED and ADJUDGED that:

1. Plaintiff has failed to prove the existence of any RS-2477 right-of-way or other right-of-way across Fort Wainwright which either alone or in combination with other rights-of-way provide access to plaintiff's property east of Fort Wainwright.

2. To the extent that any RS-2477 right-of-way ever provided access to plaintiff's property, plaintiff's action is nevertheless barred by 28 U.S.C. § 2409a(g).

3. Judgment is granted to defendant on all claims.

4. Defendant is awarded its costs in this action.

Appendix C

DATED this 13 day of January, 1992

s/ Andrew J. Kleinfeld
ANDREW J. KLEINFELD
CIRCUIT JUDGE

cc: Sheehan
Cooper
Landon

APPENDIX D — UNITED STATES DISTRICT COURT, *SHULTZ V. ARMY,* DOCKET NO. F86-030 CIVIL, FINDINGS OF FACT AND CONCLUSIONS OF LAW FILED NOVEMBER 25, 1991

BRUCE M. LANDON
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IN THE UNITED DISTRICT COURT
FOR THE DISTRICT OF ALASKA

Case No. F86-030 Civil

PAUL G. SHULTZ,

Plaintiff,

v.

DEPARTMENT OF ARMY, UNITED STATES OF AMERICA,

Defendant.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

I. FINDINGS RELATING TO PLAINTIFF AND HIS PROPERTY.

1. Plaintiff owns land east of Fort Wainwright.

2. The only existing road access between Fairbanks and plaintiff's property is through Fort Wainwright.

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3. Plaintiff's southern property line is the north bank of the Chena River.

4. The closest public highway to plaintiff's property is Badger Road which is on the south side of the Chena River.

5. There is no bridge across the Chena River in the vicinity of plaintiff's property.

6. Plaintiff and other property owners obtain road access to their property through Fort Wainwright generally using a route consisting of Trainer Road, River Road and Homestead Road.

7. The Trainer Road/River Road/ Homestead Road route does not correspond to routes which plaintiff claims pre-dated the creation of Fort Wainwright.

8. The Department of Army issues decals or permits to civilian property owners east of Fort Wainwright allowing them to traverse Fort Wainwright.

9. Plaintiff is currently barred from Fort Wainwright pursuant to a probation order filed October 16, 1990.

10. The Fairbanks NorthStar Borough will not permit plaintiff to subdivide his property unless he has unrestricted legal access to his property constructed to Borough standards.

II. FINDINGS RELATING TO THE GENERAL HISTORY OF FAIRBANKS AND FORT WAINWRIGHT.

11. Fairbanks came into existence around the turn of the century.

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12. During the period 1902-1920, a significant number of agriculture homesteads developed along the Chena River.

13. During the period 1902-1920, there was traffic to other mining settlements east of Fairbanks including Smallwood Creek.

14. Firewood was the dominant form of heating in Fairbanks in the early part of the twentieth century and numerous wood roads existed throughout the Fairbanks area.

15. Fort Wainwright (previously also known as Ladd Field and Ladd Air Force Base) is a military installation established through a series of land orders and land acquisition actions, the first of which was Executive Order (EO) 7596 dated March 31, 1937. The land orders and acquisitions were made subject to valid existing rights.

16. Many trails and roads came into existence prior to the creation of Fort Wainwright.

III. FINDINGS RELATING TO WIEST ROAD.

17. A road commonly called Wiest Road existed prior to the establishment of Fort Wainwright.

18. Wiest Road terminated at the Wiest Homestead (S 1/2 of NW 1/4 and SW 1/4 Sec. 9, and lots 4 and 5 of Sec. 16, T1S, R1E, Fairbanks Meridian) inside what is now Fort Wainwright and to the west of plaintiff's property. Wiest Road does not reach plaintiff's property, and never did.

19. Wiest Road has been obstructed by the Fort Wainwright sanitary landfill since a time prior to 1974 and continuously thereafter.

20. By virtue of the landfill obstruction, plaintiff and his predecessors in title knew or should have known of the government's claim, and if Wiest Road ever was an RS 2477 right-of-way, the statute of limitations in 28 U.S.C. § 2409a(g) bars plaintiff's claim.

21. The appearance of Wiest Road on aerial photos dated 1979 indicates that Wiest Road had fallen into disuse long prior to 1974.

22. The disuse does not establish abandonment but is circumstantial evidence which leads the court to infer that Wiest Road had been blocked by the military for a period beginning prior to twelve years before the filing of the complaint in this action.

23. Homestead Road does not correspond to or overlap Wiest Road.

24. Wiest Road does not correspond to the location of River Road (also known as Tank Road). At points, the routes overlap, but particularly west of the Fort Wainwright sanitary landfill the two routes diverge markedly.

IV. FINDINGS RELATING TO HOMESTEAD ROAD AND ACCESS TO NISSEN HOMESTEAD.

25. Plaintiff's earliest predecessor in interest was George Nissen whose homestead (SE ¼ of SW ¼ Sec. 3 and SW ¼ of

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SE ¼ Sec. 3 and E ½ of N ¼ and W ½ of NE ¼ and Lots 2 and 3 of Sec. 10, T1S, R1E, Fairbanks Meridian) is on the north bank of the Chena River approximately 2 miles upriver (east) of the Wiest homestead.

26. George Nissen raised a substantial vegetable crop.

27. The size of the Nissen crop far exceeds that needed for personal consumption and was produced for sale in Fairbanks.

28. Nissen built his cabin on the Chena River. The court infers from this circumstantial evidence and the convenience of down river and inconvenience of overland travel that Nissen used the Chena River to get his crops to market.

29. If Nissen had taken his crops to market by wagon overland, a clear road should have been visible on the 1938 aerial photos, but was not.

30. There is no bridge or other crossing of Columbia Slough visible on aerial photos taken in 1938.

31. During the 1920's, Mr. Buzby swam horses across Columbia Slough.

32. Columbia Slough flows from north to south into the Chena River at a point between the Wiest and Nissen homesteads.

33. It would not be possible for a wagon to cross Columbia Slough without a bridge or fill.

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34. Some individuals went to the vicinity of Nissen's property in the winter from the Fairbanks Chena Hotsprings Winter Sled Road by travelling along Columbia Slough when frozen.

35. A trail and foot bridge identified by Professor Mendenhall on a 1938 aerial photo were built on land that was at one time part of Nissen's homestead and do not constitute an RS 2477 right-of-way extension from the Wiest homestead to Nissen's homestead.

36. By 1918, Nissen sometimes used Wiest Road to get to Fairbanks, but not for regular transport of his crops. By 1918, Wiest and a number of other homesteaders along Wiest Road had already taken up their homesteads.

37. In approximately 1949, a Mr. Whipple, whose homestead was on the north bank of the Chena River just east of the Nissen homestead, had an automobile on his property. Mr. Whipple did not enter his homestead until 1947, by which time Fort Wainwright and a number of homesteads prevented the creation of any RS-2477 right-of-way to Whipple's property. Mr. Whipple's access was on roads and possibly power line clearings created by the military.

38. If a trail or road had existed to Nissen's homestead in 1911, it is unlikely that the section line calls of the survey of T1S, R1E, Fairbanks Meridian (accepted in 1913), would have missed it.

39. Prior to the establishment of Fort Wainwright, no route susceptible to wagon or motor vehicle use existed between the Wiest and Nissen homesteads.

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40. Nissen used the Chena River to get his crop to town.

41. Homestead Road was constructed at some time between 1938 and 1948.

42. Within Fort Wainwright, Homestead Road traverses Lots 3, 4, 5 of Sec. 16, T1S, R1E, Fairbanks Meridian.

43. Lot 3 of Sec. 16, T1S, R1E, Fairbanks Meridian was withdrawn for territorial school purposes in 1915 and has been in a withdrawn status continuously up to the present.

44. James Wiest filed a homestead application with the General Land Office on July 23, 1914 which includes Lots 4 and 5, Sec. 16, T1S, R1E, Fairbanks Meridian and those lots have been continuously out of public domain status since at least that date.

45. No public highway easement exists for that portion of Homestead Road on Fort Wainwright under RS 2477 or otherwise.

V. FINDINGS RELATING TO ACCESS TO THE VICINITY OF CORTNEY RANCH.

46. There was no established trail of fixed location from the Fairbanks Chena Hotsprings Winter Sled Road, LaZelle Road or Wiest Road to the vicinity of Courtney Ranch (SE 1/4 of SW 1/4 and Lots 4, 5, 6 of Sec. 6, T1S, R2E, Fairbanks Meridian) prior to the time that portions of the intervening land now within Fort Wainwright had been taken up by homestead entries or acquired by the military.

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47. Overland travel to Cortney Ranch from Fairbanks traversed swamp land and wooded areas with numerous wood roads. Consequently, it was not necessary to establish a definite route to Cortney Ranch.

48. A summer road to Cortney Ranch was unfeasible because of the swamp land.

49. No summer road appeared in the vicinity of Cortney Ranch on the 1938 aerial photos. If a summer road had existed in 1938, it would have been clearly visible.

50. Travel in winter to Cortney Ranch occurred opportunistically anywhere across the frozen, treeless swamp.

51. No individual route to Cortney Ranch ever experienced sufficient use to create an RS 2477 right-of-way by public users.

52. During the 1920's, Mr. Buzby travelled to Cortney Ranch, at which time the whole area was criss-crossed with wood trails.

53. Wood haulers moved wood using Wiest Road and other roads and then took off to the east along wood trails on various changing routes.

54. The 1938 aerial photos indicate trail fragments to the vicinity of Cortney Ranch which traverse the northernmost portion of the Nissen homestead. Nissen did not use that route to get to Fairbanks.

55. In the 1938 aerial photos, the Fairbanks Chena Hotsprings Winter Sled Road is cleared to a width of 12' to 16';

Wiest Road is 10' to 12' wide, while the fragments of trails leading to the vicinity of Cortney Ranch are considerably thinner and less distinct.

56. By the time Mr. Wigger observed regular traffic on the trail to the vicinity of Cortney Ranch, the military reservation had already come into existence.

57. No right-of-way under RS 2477 or otherwise exists across Fort Wainwright to the vicinity of Cortney Ranch.

VI. FINDINGS RELATING TO LAZELLE ROAD.

58. LaZelle Road has been continuously blocked by a locked gate and fence surrounding the Fort Wainwright oil tank farm and by the tank farm itself at a point on the western boundary of Fort Wainwright for a period of time exceeding twelve years prior to the institution of this action.

59. LaZelle Road has been blocked by a ski tow cable at the Fort Wainwright ski area for a period in excess of twelve years prior to the institution of this action.

60. By virtue of these blockages, plaintiff and his predecessors knew or should have known of the military's claim, and adjudication of LaZelle Road is barred by the statute of limitations in 28 U.S.C. § 2409a(g).

61. LaZelle Road was built in stages. An extension of LaZelle Road in Sections 3 and 4, T1S, R1E, Fairbanks Meridian was constructed by the military in 1950 or 1951 after most of the land in the extension was unavailable for the creation of an RS 2477 right-of-way either because it had been withdrawn or

acquired by the military, or because it had been taken up by homesteads.

62. LaZelle Road does not overlap the Fairbanks Chena Hotsprings Winter Sled Road and is located in excess of 100' from the sled road.

63. In Sections 3 and 4, T1S, R1E, Fairbanks Meridian, Lazelle Road is cut into the hillside.

64. The cut does not appear on aerial photos until after 1949.

65. Mr. Kalen confirmed with a tape measure, by measuring from LaZelle Road to the Fairbanks Chena Hotsprings Winter Sled Road, that the latter is in the flats more than 100' from LaZelle Road.

66. A sled trail could not have existed in the location of LaZelle Road in the absence of a cut because the natural slope is such that sleds could not stay on a trail without the cut.

67. Neither LaZelle Road nor the Fairbanks Chena Hotsprings Winter Sled Road went to plaintiff's property.

68. In order for there to be an RS 2477 right-of-way to plaintiff's property, plaintiff would have to establish the existence of an RS 2477 right-of-way from LaZelle Road or the Fairbanks Chena Hotsprings Winter Sled Road to plaintiff's property.

69. There was no trail or road right-of-way from LaZelle Road or Fairbanks Chena Hotsprings Winter Sled Road to plaintiff's property established under RS 2477 or otherwise.

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VII. FINDINGS RELATING TO FAIRBANKS CHENA HOTSPRINGS WINTER SLED ROAD.

70. A "sled road" is a winter trail wide enough to accommodate a large horse drawn bob sled such as might be used to haul wood or passengers.

71. Fairbanks Chena Winter Sled Road acquired its present location in approximately 1923.

72. Tree ring counts indicate that the Fairbanks Chena Hotsprings Winter Sled Road has not been used except for occassional recreational snow machine use on portions since approximately 1950-1951. This is circumstantial evidence from which the court infers blockage of the winter sled road for a period in excess of twelve years prior to the filing of the complaint in this case.

73. Fairbanks Chena Hotsprings Winter Sled Road has been continuously blocked for several hundred feet by the Fort Wainwright sanitary landfill for a period of time in excess of twelve years prior to the filing of the complaint in this action.

74. By virtue of this blockage, plaintiff and his predecessors in interest knew or should have known that the government claimed the right to restrict access along the Fairbanks Chena Hotsprings Winter Sled Road for a period in excess of twelve years prior to the filing of the complaint in this action.

75. Adjudication of the Fairbanks Chena Hotsprings Winter Sled Road is barred by the statute of limitations in 28 U.S.C. § 2409a(g).

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VIII. FINDINGS RELATING TO FAIRBANKS SMALLWOOD ROAD.

76. Fairbanks Smallwood Road has been continuously blocked by a fence near the western boundary of Fort Wainwright for a period in excess of twelve years prior to the filing of the complaint in this action.

77. The Fairbanks Smallwood Road does not overlap or come within 100' of the Trainer Road/River Road/Homestead Road route used by plaintiff to access his property.

78. By virtue of the blockage by the fence, plaintiff and his predecessors in interest knew or should have known of the government's claim and adjudication of the Fairbanks Smallwood Road is, therefore, barred by the statute of limitations in 28 U.S.C. § 2409a(g).

IX. FINDINGS RELATING TO SAGE HILL ROAD.

79. Sage Hill Road is a road running in a northeasterly direction from River Road in Sec. 8, T1S, R1E, Fairbanks Meridian to LaZelle Road in Sec. 4, T1S, R1E, Fairbanks Meridian.

80. Sage Hill Road was built by the military after the military had acquired the land traversed thereby and is not a public right-of-way established under RS 2477 or otherwise.

81. Aerial photos taken in 1938 reveal a number of trail fragments in the vicinity of the present location of Sage Hill Road. None of the trail fragments constitute an established route of travel with sufficient use to establish an RS 2477 right-of-way.

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X. FINDINGS RELATING TO TRAINER ROAD.

82. Government control of Trainer Gate during the period from 1974-76 was intermittent and insufficient to put plaintiff or his predecessors in interest on notice that the United States claimed an interest in controlling access on the road.

83. During the period from 1974-76, security measures by Alyeska at Trainer Gate were designed to protect Alyeska's private property kept on Fort Wainwright.

84. During the period 1974-1976, there existed long periods of time when one could drive through an open gate with no guards and an apparently boarded up guard house.

85. Trainer Road was built by the military after acquisition of the land traversed. I infer this mainly from the time it came into existence.

86. Trainer Road does not appear on the 1938 aerial photos of Fort Wainwright.

87. Trainer Road is neither congruent with nor within 100' of the location of roads or trails pre-existing the creation of Fort Wainwright.

88. In 1944, the military blocked a number of routes across Fort Wainwright and suggested two alternate routes to Steele Creek and vicinity. One of those alternate routes included the present location of Trainer Road.

89. In rerouting traffic along the alternate routes, the military neither dedicated the alternate routes as public rights-

of-way nor offered to create a public right-of-way along either of the alternate routes.

90. Trainer Road is not a public right-of-way under RS 2477 or otherwise.

CONCLUSIONS OF LAW

91. Plaintiff has failed to prove the existence of any RS 2477 right-of-way or other right-of-way across Fort Wainwright which either alone or in combination with other rights-of-way provide access to plaintiff's property east of Fort Wainwright.

92. To the extent that any RS 2477 rights of way ever provided access to plaintiff's property, plaintiff's action is nevertheless barred by 28 U.S.C § 2409a(g).

DATED this 25 day of November, 1991.

s/ Andrew J. Kleinfeld
ANDREW J. KLEINFLED
United States District Judge

Copies to:
Sheehan
Landon (DOJ)
Cooper
12-11-91 cpb

APPENDIX E — OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT FILED SEPTEMBER 28, 1989, REPORTED AT 886 F.2d 1157 (9th Cir. 1989)

FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 87-4346

D.C. No.
CV-86-0030-AJK

PAUL G. SHULTZ,

Plaintiff-Appellant,

v.

DEPARTMENT OF ARMY, UNITED STATES OF AMERICA,

Defendant-Appellee.

OPINION

Appeal from the United States District Court
for the District of Alaska
Andrew J. Kleinfeld, District Judge, Presiding

Argued and Submitted
November 4, 1988 — Seattle, Washington

Filed September 28, 1989

Appendix E

Before: Dorothy W. Nelson, Robert Boochever and Melvin Brunetti, Circuit Judges.

Opinion by Judge Nelson; Dissent by Judge Brunetti

SUMMARY

Statutes of Limitation/Real Property

Reversing the district court's judgment of dismissal, the court held that a quiet title action under 28 U.S.C. § 2409a(g) (1982) accrues when the landowner or his predecessor-in-interest knew or should have known of the United States' claim.

Appellant Paul Shultz appealed from the district court's dismissal of his quiet title action against appellee the United States finding that the action was barred by section 2409a(g) which prohibits civil actions to adjudicate disputed titles to real property in which the United States claims an interest unless they are commenced within twelve years of the date on which they accrued.

Shultz sued the government in April of 1986, claiming a right of access to Trainer Gate Road. The Army argued that because Shultz was put on notice of the government's claim to the property in the early 1950's when the Army erected a fence, gate, and guardhouse where Trainer Gate Road enters Fort Wainright, his action is barred by the statute of limitations. Shultz argued that the government did not assert any apparent claim until 1981 when it began to enforce a pass system.

A reasonable person would not perceive the erection of structures on land to which the military had title as a present

claim to an interest in a roadway that is adjacent to that land, where the guardhouse is rarely attended and access to the roadway is completely unrestricted. The parties presented conflicting affidavits regarding whether the Army restricted access to the roadway prior to 1974, creating a genuine issue of material fact precluding summary judgment. If the government has apparently abandoned any claim it once asserted, and then it reasserts a claim, the later assertion is a new claim and the statute of limitations for an action based on that claim accrues when it is asserted.

Judge Brunettit dissented in a separate opinion stating that the structures sufficiently manifested the government's claim to the roadway and that the factual issues of when the government imposed a pass requirement or restricted access are not material.

COUNSEL

Joseph W. Sheehan, Fairbanks, Alaska, for the plaintiff-appellant.

William B. Lazarus, Attorney, Department of Justice, Lands Division, Washington, D.C., for the defendant-appellee.

OPINION

NELSON, Circuit Judge:

Paul G. Shultz appeals from the district court's dismissal of his quiet title action against the United States for lack of jurisdiction. The district court found that the action was barred by 28 U.S.C. § 2409a(g) (1982), which prohibits civil actions

to adjudicate disputed titles to real property in which the United States claims an interest unless they are commenced within twelve years of the date on which they accrued. We reverse. An action under section 2409a accrues when the landowner or his predecessors-in-interest knew or should have known of the United States' claim. Erection of a fence, gate, and generally unattended guard post alone was insufficient to put a reasonable landowner on notice of a claim. We hold that the earliest the cause of action accrued was when the Army began to restrict access through a pass system, and that if, when access to the road subsequently went unrestricted, Shultz or his predecessors-in-interest had reason to believe the government did not continue to claim an interest, the cause of action accrued when the government later asserted a right to restrict access. Therefore, we reverse the district court's grant of summary judgment to the defendants for lack of jurisdiction and remand for further proceedings.

Standard of Review

Appellate review of a district court's grant of summary judgment for lack of jurisdiction under section 2409a is *de novo.*[1] *California v. Yuba Goldfields, Inc.*, 752 F.2d 393, 395 n.1 (9th Cir. 1985), *cert. denied*, 474 U.S. 1005 (1985). A district court's factual findings on a jurisdictional issue must be accepted unless they are clearly erroneous. *Bruce v. United States*, 759 F.2d 755,758 (9th Cir. 1985). When the question of accrual of the statute of limitations turns on what a reasonable person should know, it is, like negligence, a mixed question of fact and law

1. Because the court found it did not have jurisdiction, its action is more properly characterized as a dismissal under Rule 12(b)(1) than as a summary judgment. *See D.C. Transit System, Inc. v. United States*, 717 F.2d 1438, 1440 n.l (D.C. Cir. 1984).

reviewed for clear error. *See Colleen v. United States,* 843 F.2d 329, 331 (9th Cir. 1987) (citing *United States v. Mc Conney,* 728 F.2d 1195, 1204 (9th Cir.) (en banc), *cert. denied,* 469 U.S. 824 (1984)).

Discussion

Mr. Shultz owns real estate, which he purchased in parcels in 1974, 1979, and 1983, northeast of Fort Wainwright Military Reservation. The federal land withdrawals by which Fort Wainwright was established were made "subject to valid existing rights" to public roads in use before 1943. 43 U.S.C. § 932, *repealed,* Pub. L. No. 94-579 (Oct. 21, 1976). In the early 1950's, the Army erected a fence, gate, and guardhouse adjacent to the road to which Shultz claims a public right of access, now called Trainer Gate Road. The parties dispute whether, prior to 1974, the Army restricted access on Trainer Gate Road to the military base. The Army does not contest, however, Mr. Shultz's affiant's statement that the Army did not use a pass system or prohibit access to the road from 1974 to 1981. In 1981, the Army began to require those who sought to use the road to present passes. The Army refused Mr. Shultz access to the road in 1981 and thereafter.

Mr. Shultz sued the government in April, 1986, claiming a right of access to Trainer Gate Road. The Army argues that his claim is barred by 28 U.S.C. § 2409a, the statute of limitations for quiet title actions, because Shultz was put on notice of the government's claim to the property in the early 1950's when the Army erected a fence, gate, and guardhouse where Trainer Gate Road enters Fort Wainright. Mr. Shultz argues that his claim against the United States is not barred because it accrued within the twelve-year statute of limitations. He argues that the

government did not assert any apparent claim to the road until 1981, when it began to enforce a pass system. He asserts that the government must either have had a recorded instrument under AS-34.14.260(a)(3) or have manifested its interest in the highway in a manner similar to that required by Alaska law to establish adverse possession — open, notorious, continuous, and hostile — in order to trigger the statute of limitations period. Finally, Mr. Shultz argues that even if the Army had manifested an interest in the road prior to 1981, the statute of limitations period started anew after 1981, because the Army did not restrict use of the road from 1974 through 1981.

The district court granted summary judgment to the defendant on the ground that the fence and gate implied a government claim of a right to control access, whether exercised or not.

The Quiet Title Act, 28 U.S.C. 2409a(g), provides:

> Any civil action under [the Quiet Title Act] shall be barred unless it is commenced within twelve years of the date upon which it accrued. Such action shall be deemed to have accrued on the date the plaintiff knew or should have known of the claim of the United States.

28 U.S.C. § 2409a(g). The court must strictly construe the Quiet Title Act's statute of limitations in favor of the government. *Block v. North Dakota ex rel. Bd. of Univ. & School Lands,* 461 U.S. 273, 287 (1983); *Yuba,* 752 F.2d at 395.

The issue on appeal is whether the district court erred in finding that Shultz's cause of action accrued in the early 1950's.

This circuit has rejected explicitly Shultz's contention that the cause of action accrues and the statute of limitations begins to run only when the United States acts in a manner openly hostile and adverse to a landowner's interest. *Yuba*, 752 F.2d at 397 ("Neither the language of the statute nor the legislative history of the Act requires a showing of adversity . . . ."). The statute of limitations is not triggered however, when the United States' claim is ambiguous or vague. *See Yuba*, 752 F.2d at 397 (citing *Poverty Flats Land & Cattle Co. v. United States*, 706 F.2d 1078 (10th Cir. 1983)).

The statutory term "should have known" imparts a test of reasonableness. *See, e.g. Yuba*, 752 F.2d at 396; *Amoco Prod. Co. v. United States*, 619 F.2d 1383, 1388 (10th Cir. 1980). The question is whether the United States' actions would have alerted a reasonable landowner that the government claimed an interest in the land. From 1974 until 1981, the Army did not seek to restrict access to the road in any way. The guard station was generally unattended. The parties dispute whether the Army required passes prior to 1974. The district court concluded that the dispute regarding passes was irrelevant because the Army's erection of a fence, gate, and guardhouse on a military base adjacent to the road was, alone, sufficient to alert a reasonable landowner of the Army's interest in the road itself. We disagree. Construction of the gate and guardhouse may indicate the military's interest in securing only the adjoining property, to which it had clear title, rather than to the right-of-way itself. Such construction could, as Mr. Shultz asserts, reasonably be interpreted as preparation for the possibility that in a time of national emergency the Army might have to close the gate to protect military operations, rather than as a present claim to an interest in the right-of-way.

Appendix E

No federal cases address the issue whether a fence, gate, and guardhouse on a military installation adjacent to a roadway are sufficient to give notice under section 2409a of a claim of interest in the roadway. The district court relied in part on *Park County v. United States*, 626 F.2d 718 (9th Cir. 1980), *cert. denied*, 449 U.S. 1112 (1981), in which the Ninth Circuit found that a Forest Service sign and rock barrier on a purportedly public right-of-way created by 43 U.S.C. § 932, alerting the public that they were entering a national forest area from which motor vehicles were prohibited, constituted notice not only of a claim by the United States to the portion of the purported right-of-way located behind the sign, but also "alerted them to make reasonable inquiry" regarding a claim to the remainder of the right-of-way. The *Park County* court reasoned that the sign gave notice of a claim to the whole right-of-way because the remainder would have little utility if it were severed. *Id.* at 721 n.6. *Park County* is distinguishable from the present case, however, on the ground that it is a disputed fact whether the government ever sought to regulate the flow of traffic on the road through Fort Wainwright through the use of guards, a posted sign, or otherwise, as it did through the national park.

The district court also relied on *Howell v. United States*, 519 F. Supp. 298, 304 (N.D. Ga. 1981), in which the court found that the painting of boundary lines alone, without actual interference with the landowner's property, was sufficient to notify the landowner of the government's claim. This case too is distinguishable: whereas the painting of boundary lines is a clear assertion of a claim of interest in land, construction of a gate and a guardhouse, where neither is used, on a military installation next to a roadway that was purportedly public may indicate the military's interest in securing only the adjoining property, rather than in the public right-of-way. A reasonable

person would interpret the unattended structures as preparation for the possibility that the Army might need to protect its military base. A reasonable person would not perceive the erection of such structures on land to which the military had title, as a present claim to an interest in a roadway that is adjacent to that land, where the guardhouse is rarely attended and access to the roadway is completely unrestricted.

Neither the gate, the fence, nor the guardhouse interfered with the public's use of the road. No physical barriers were placed in the road and no posted notice informed the public that the road was closed to vehicular traffic. Therefore, the structures alone were insufficient to notify the public of the Army's claim of an interest in the roadway, and thus their construction did not trigger the statute of limitations.

If, however, the Army restricted access to the roadway prior to 1974, there is a factual issue whether Mr. Shultz's predecessors-in-interest reasonably should have been aware of a claim by the government of interest in the roadway.[2] The parties presented conflicting affidavits regarding whether the Army restricted access to the roadway prior to 1974, creating a genuine issue of material fact precluding summary judgment. *See, e.g., McLaughlin v. Liu,* 849 F.2d 1205, 1207 (9th Cir. 1988). In addition, there is a factual issue whether the government's failure to restrict access to the base prior to 1981 led Shultz or his predecessors-in-interest reasonably to believe that the government did not continue to claim an interest in the roadway.

---

2. The requirement of passes would not necessarily give reasonable notice of the government's claim of an interest in the road. For example, in a time of emergency the government might well close a road, if necessary to protect a military installation, without claiming an interest in the road.

Appendix E

The statute of limitations provision in the Quiet Title Act cannot reasonably be read to imply that if the government has once asserted a claim to property, twelve years later any quiet title action is forever barred. If the government has apparently abandoned any claim it once asserted, and then it reasserts a claim, the later assertion is a new claim and the statute of limitations for an action based on that claim accrues when it is asserted.

Conclusion

We remand to the district court for a determination whether the Army restricted access to the roadway prior to 1974 so as reasonably to put Mr. Shultz's predecessors-in-interest on notice of the government's claim to an interest in the right-of-way barring use by others. If Shultz's predecessors-in-interest had reasonable notice of the government's claim prior to 1974, the district court should determine if at some subsequent time Shultz or his predecessors had reason to believe the government did not continue to claim an interest. In that event, the present claim would have accrued when the government reasserted a claim.

REVERSED and REMANDED.

BRUNETTI, Circuit Judge, dissenting:

I disagree with the majority's holding that the Army's erection of a fence, gate and guardhouse next to the roadway was insufficient to put a reasonable landowner on notice of a claim. As the district court noted the fence, guardhouse and gate manifest a government claim of right to control access to the roadway, whether exercised or not.

Appendix E

The majority incorrectly interprets *Park County* as holding that the government must manifest a claim of interest in a right of way by an actual physical interference or a complete prohibition of the public's use to the roadway. In *Park County* we stated that the posted sign "put [the appellants] on notice that the United States claimed control over at least a substantial portion of the right-of-way. This claim should have put the appellants on constructive notice and alerted them to make reasonable inquiry as to the remainder of the purported right-of-way." *Park County*, 626 F.2d at 721 n.6. We held that the statute of limitations contained in the Quiet Title Act barred the county's suit even as to the portion of the road in front of the rock barrier and sign which was not blocked or posted. *Id.* at 721.

As in *Park County*, Shultz and his predecessors in interest were alerted by the fence, gate and guardhouse to make a reasonable inquiry as to the government's claim to an interest in the roadway behind the structures. The Army need not have blocked Shultz's or his predecessors' path in order to communicate an interest in the roadway. The interest was amply shown by the structure and "should have put the appellants on constructive notice and alerted them to make reasonable inquiry as to the [government's claim]." *Id.* at 721 n.6.

Neither the open gate structure in this case or the painted boundary lines in *Howell v. United States*, 519 F. Supp. 298, 304 (N.D. Ga. 1981), physically prevent the public use of the government property, but the open gate like the painted boundary line gave notice of the government's claimed ownership of the road.

I disagree with majority's conclusion that the construction

of a gate and guardhouse next to a roadway indicates only the military's interest in securing the adjoining property. True, the closing of the gate also blocks access to the land adjoining the road, but that is irrelevant to the notice given by the structure that the gate can block use of the road. Access can not be had to the adjoining land without using the road. If the government had wanted to block access to the adjoining land, they could have fenced it off from the road without erecting a guardhouse and gate to block the road.

The Brockman affidavit, submitted by Shultz, states that the military fenced the road and "allow[ed] us to use" it. Accordingly, there is no genuine issue of fact as to the permissive use of the roadway by Shultz and his predecessors nor is there a genuine issue of fact that Shultz and his predecessors had reason to know of the government's claim of a right to control access to the roadway.

Because I would hold that the structures sufficiently manifest the government's claim to the roadway, the factual issues of when the government imposed a pass requirement or restricted access is not material. I would affirm the district court.

APPENDIX F — UNITED STATES DISTRICT COURT, *SHULTZ V. ARMY,* DOCKET NO. F86-030 CIVIL, FINAL JUDGMENT FILED NOVEMBER 4, 1987

UNITED STATES DISTRICT COURT
DISTRICT OF ALASKA

CASE NUMBER: F86-30 Civil

PAUL G. SHULTZ,

plaintiff

V.

DEPARTMENT OF ARMY, UNITED STATES OF AMERICA,

defendant.

JUDGMENT IN A CIVIL CASE

☐ **Jury Verdict.** This action came before the Court for a trial by jury. The issues have been tried and the jury has rendered its verdict.

☒ **Decision by Court.** This action came to trial or hearing before the Court. The issues have been tried or heard and a decision has been rendered.

IT IS ORDERED AND ADJUDGED that plaintiff's claims are dismissed for lack of jurisdiction, except that plaintiff's claim for compensation for the taking of property is transferred to the United States Claims Court.

cy; Joseph Sheehan
Stephen Cooper (AUSA)

Appendix F

APPROVED:

s/ Andrew J. Kleinfeld
Andrew J. Kleinfeld, U.S. District Judge

Nov. 04, 1987
Date

JoAnn Myres
Clerk

s/ Mr. M. Weingardt
(By) Deputy Clerk

APPENDIX G — UNITED STATES DISTRICT COURT, *SHULTZ V. ARMY,* DOCKET NO. F86-030 AJK, ORDER FILED OCTOBER 8, 1997

NOT FOR PUBLICATION

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 92-35197
92-35580

D.C.No.CV-86-30-ALK

PAUL G. SHULTZ,

Plaintiff-Appellant,

v.

DEPARTMENT OF ARMY, UNITED STATES OF AMERICA,

Defendant-Appellee.

ORDER

Before: SCHROEDER, FLETCHER and ALARCON, Circuit Judges

The petition for rehearing to consider the cost appeal is GRANTED.

The cost appeal is dismissed for lack of appellate jurisdiction. 28 U.S.C. § 1291 and Fed.R. Civ.Pro. 57.

APPENDIX H — *FITZGERALD V. PUDDICOMBE*, 918 P.2d 1017 (ALASKA 1996)

THE SUPREME COURT OF THE STATE OF ALASKA

Supreme Court No. S-6579

Superior Court No.
13PA-91-391 CIV

JOANNE FITZGERALD,

Appellant,

v.

CRAIG PUDDICOMBE AND JOHN DUNHAM,

Appellees.

OPINION

[No. 4340 - April 26, 1996]

Appeal from the Superior Court of the State of Alaska, Third Judicial District, Palmer, Brian C. Shortell, Judge.

Appearances: JoAnne Fitzgerald, *pro se*, Wasilla. Patricia R. Hefferan, Kopperud and Hefferan, Wasilla, for Appellees.

Before: Compton, Chief Justice, Rabinowitz, Matthews, and Eastaugh, Justices. [Shortell, Justice pro tem,* not participating.]

* Sitting by assignment made under article IV, section 16 of the Alaska Constitution.

Appendix H

COMPTON, Chief Justice.

I. *INTRODUCTION*

Craig Puddicombe and John Dunham filed an action to quiet title to property they owned. Joanne Fitzgerald and Michael Connor claimed a right to use a trail through the property. After a bench trial, the superior court denied Fitzgerald's and Connor's claims, quieted title in and awarded partial attorney's fees to Puddicombe and Dunham. Fitzgerald appeals. We reverse.

II. *FACTS AND PROCEEDINGS*

Puddicombe and Dunham own United States Survey 5265 (USS 5265), located on the Knik River near Metal Creek. They acquired the property in 1983 from Joanne Roberts. Roberts had acquired the property from Doug Sumner, who homesteaded the property.

Sumner entered the property in 1965. He testified that when he first visited the area, there were a number of narrow trails going from Metal Creek onto his homestead. Using a bulldozer, Sumner built a driveway on the property. He testified that the driveway did not precisely follow, but may have roughly paralleled, one or more of the existing trails. He placed a cable across the entrance to the driveway and posted no trespassing signs on the property.

Sumner obtained a patent to the property in 1979. The patent reserved no easements or rights-of-way for the general public or for private individuals.

Appendix H

In 1978 Connor and Fitzgerald staked mining claims in the Metal Creek area. Since then, Connor and Fitzgerald consistently have gained access to their claims through USS 5265.

In 1990, to more carefully limit access to USS 5265, Dunham and Puddicombe installed a more permanent, locking cable across the driveway. Puddicombe offered Connor a key to the cable and an easement across the property. Connor refused the offer and asserted that he did not need permission to pass through the property. Puddicombe and Dunham filed suit to quiet title to the property, naming, *inter alia*, Connor and Fitzgerald as defendants.[1]

Defendants claimed a right to pass through USS 5265 on the basis of both private and public prescriptive easements, and on the basis of a public right-of-way pursuant to former 43 U.S.C. section 932, Revised Statute (RS) 2477. The superior court rejected all their claims, quieted title in Puddicombe and Dunham, and ordered Connor and Fitzgerald to pay thirty percent of Puddicombe's and Dunham's attorney's fees. Fitzgerald filed a motion for a new trial under Alaska Civil Rule 59, on the ground of newly discovered evidence. The superior court denied the motion without comment.

Fitzgerald claims the superior court erred (1) in its determination that no RS 2477 public right-of-way through USS 5265 exists, (2) in denying her motion for a new trial, and (3) in assessing attorney's fees against her.

III. *DISCUSSION*

The superior court's determination that no RS 2477 right-

1. The other defendants settled before trial.

of-way through USS 5265 exists was based on factual findings about the use of the property and legal conclusions about whether that use was sufficient to establish an RS 2477 right-of-way. We review factual findings under the clearly erroneous standard. *See Oaksmith v. Brusich*, 774 P.2d 191, 195 (Alaska 1989); *Fairbanks North Star Borough v. Tundra Tours*, 719 P.2d 1020, 1024-25 (Alaska 1986). We review *de novo* the application of law to the relevant facts. *See Luedtke v. Nabors Alaska Drilling, Inc.*, 834 P.2d 1220, 1223 (Alaska 1992).

RS 2477 was a congressional grant of rights-of-way which provided: "[T]he right of way for the construction of highways over public lands, not reserved for public uses, is hereby granted." 43 U.S.C. §932, *repealed by* Pub. L. No. 94-579, Title VII, § 706(a), 90 Stat. 2793 (1976), *quoted in Hamerly v. Denton*, 359 P.2d 121, 123 (Alaska 1961). The grant was self-executing; an RS 2477 right-of-way would have come into existence automatically if a public highway was established across public land in accordance with the law of Alaska. *Shultz v. Dep't of Army*, 10 F.3d 649, 655 (9th Cir. 1993). Although RS 2477 was repealed in 1976, it nevertheless governs this case since the claimed right-of-way would have existed at the date of repeal. *See Dillingham Commercial Co. v. City of Dillingham*, 705 P.2d 410, 413 (Alaska 1985).

In order to have completed the grant there must have been " 'either some positive act on the part of the appropriate public authorities of the state, clearly manifesting an intention to accept a grant, or . . . a public user for such a period of time and under such conditions' " as to indicate that the grant had been accepted. *Id.* at 413-14 (quoting *Hamerly*, 359 P.2d at 123).

RS 2477 granted rights-of-way over "public lands" only. Once the land had passed into private hands, the grant could no

longer be accepted. *Hamerly*, 359 P.2d at 123. Homesteads pass from the public domain to the private as of the date of entry. *See Id.* ("When a citizen has made a valid entry under the homestead laws, the portion covered by the entry is then segregated from the public domain. . . . Consequently, a highway cannot be established under the statute during the time that the land is the subject of a valid and existing homestead claim."); *see also Dillingham*, 705 P.2d at 414. Sumner entered the property in 1965. Therefore, to prove the existence of an RS 2477 right-of-way, Fitzgerald must prove acceptance of the grant before 1965.

Fitzgerald argues that public dedication acceptance of the RS 2477 grant is demonstrated by the use of government money to improve the trail. The superior court found that "Sumner has not been shown to have used government money to build his trail." This finding is fully supported by the record.

Fitzgerald also argues that public acceptance of the grant is manifested by the fact that the trail was "surveyed, platted and described in field survey notes.[2] The superior court determined

---

2. Fitzgerald's argument is based on testimony given by Loretta Fitzsimons, a land law examiner for the B.L.M.:

> The Court: Does that mean to you that this file doesn't show anything regarding whether or not there is a public trail through the property?
>
> Ms. Fitzsimons: *The field examination and the survey indicate that there is*. But we had no authority to put it in the patent under [sic]. In other words a reservation has to be put in the patent pursuant to some law and we did not have a law to put it under there.

(Cont'd)

that Fitzgerald had not proven that the statutory grant was accepted by the State. We agree with this determination.

We disagree, however, with the superior court's determination that Fitzgerald did not show pre-entry use sufficient to establish public-use acceptance of the RS 2477 grant.

The extent of public use necessary to establish acceptance of the RS 2477 grant depends upon the character of the land and the nature of the use. *See Shultz*, 10 F.3d at 655 ("Our decision must take into account the fact that conditions in Alaska present unique questions . . . What might be considered sporadic use in another context would be consistent or constant use in Alaska."); *Ball v. Stephens*, 158 P.2d 207, 211 (Cal. App. 1945) ("The travel over the road . . . was irregular but that was due to the nature of the country and to the fact that only a limited number of people had occasion to go that way."). Although "infrequent and sporadic" use is not sufficient to establish public acceptance of the grant, *Hamerly*, 359 P.2d at 125, continuous use is not required. *Shultz*, 10 F.3d at 656; *cf. McGill v. Wahl*, 839 P.2d 393, 397 (Alaska 1992) (requiring proof of continuous use to establish prescriptive easement). Nor does the route need to be significantly developed to qualify as a "highway" for RS 2477 purposes; even a rudimentary trail can qualify. *See Dillingham*, 705 P.2d at 414; *Shultz*, 10 F.3d at 656-57.

(Cont'd)

See Appellant's Reply Brief at 15-16 (emphasis is Appellant's). As Fitzsimons' testimony makes clear, the B.L.M. could include in the survey only those rights-of-way established prior to the survey; it had no authority to dedicate the trail. Moreover, the survey was done in 1974 or 1975, ten years after the date of entry. The presence of trails through the property at the date of survey is not relevant to the RS 2477 determination.

Appendix H

In *Hamerly*, the court rejected an RS 2477 claim where the evidence showed that a total of four individuals used the route on a limited number of occasions during the time when the property through which it passed was open to the public. *Hamerly*, 359 P.2d at 124-25. It noted that the nature of the road belied public highway status:

> The road could not be considered as something that was either necessary or convenient for the accommodation of the public. Where there is a dead end road or trail, running into wild, unenclosed and uncultivated country, the desultory use thereof . . . does not create a public highway.

Id. (footnote omitted).

In *Dillingham*, we held that a road running across private property from the city docks to the town was subject to an RS 2477 right-of-way because roughly the same route had been used in the 1920's and 30's, before the property was withdrawn from the public domain. *Dillingham*, 705 P.2d at 413-14. The observation, from *Hamerly*, that a public highway must be "either necessary or convenient for the accommodation of the public" was expressed as a requirement that the claimed right-of-way must have "definite termini." *Id.* at 414; *see also Shultz*, 10 F.3d at 657 ("Trails 'running into wild, unenclosed and uncultivated country' do not meet the minimum standard of definiteness (they lack one terminus) nor do they suggest sufficient public use." (citing *Dillingham*, 705 P.2d at 414)). However, we also held that "[i]f there is a public road on [the property], it may be used for any purpose consistent with public travel." *Dillingham*, 705 P.2d at 415.

Appendix H

With regard to the existence of a trail across the property, the superior court found:

> There is a trail, a well established trail . . . that proceeds approximately 22 miles along the Knik River to the general area of the Sumner property. However, that trail has not been shown on any evidentiary standard to have gone through the Sumner/Puddicombe property.

That finding notwithstanding, it is clear that there were trails through the property before 1965. Sumner, the entryman, testified that there were several trails across USS 5265 when he originally homesteaded the property, at least one of which was several decades old. Al Frey testified that a well-defined trail existed in 1954. James Herman testified that there was "really a good trail" through the property in the 1940's. Although a single trail may not have predominated prior to entry, a fair reading of Sumner's testimony reveals that he generally followed the trails' established route in constructing his driveway:

> Ms. Hefferan: Now, did you put this driveway on existing road or trail or was there anything there when you built your driveway?
>
> Mr. Sumner: There could have been a trail there that I might have crossed two or three times, all of the trails didn't go straight up the hill. They just wandered around the easiest way. I basically just put the road, driveway up straight as I could.
>
> Ms. Hefferan: So you didn't follow any existing trail when you built your driveway?

Mr. Sumner: I didn't set out to follow any trail, I might have went right over one and off of one to the side but I went the easiest way, same as the trails.

. . . .

The Court: Is that the trail as you blazed it or did it exist before you?

Mr. Sumner: Yes, I put it in. It is fairly close since I put it in.

The Court: What existed at the mine [sic] before you blazed it?

Mr. Sumner: There was a partial trail that I basically followed, not exactly, but I put in the trail a lot closer and a lot straighter.

With regard to the use of the trail, the superior court found:

[I]t may legitimately be concluded that some miners, hunters, and other wilderness travelers crossed the parcel on various occasions over a period of fifty to sixty years. However, the evidence regarding pre-1960 use of this parcel of land and the surrounding area is vague. It has not been shown that any particular trail was used during the pre-1960 years, either on or off US 5265 in such a way as to show the RS 2477 grant was accepted by the public. Jim Hermon prospected in the area and trapped there from 1942 to the early 1960's. The trail he used for trapping was not the trail Sumner cut out in the

> 1960's. He used a "good" walking trail from Metal Creek which Sumner later built a cabin across. Hermon testified that he knew of approximately six other persons who used the same trail in the 1930's, 1940's and 1950's, "at one time or another". Hermon himself didn't use the trail after 1960. The trail Hermon used "went along the bank". It was not for the most part located along the trail cut by Sumner across his parcel. Before the 1930's the evidence does not show a specific location for any trail across the parcel. Hermon's testimony is the only credible basis for a finding of specific use of a trail that actually crossed the parcel. That trail was used by less than ten persons in vaguely-described circumstances over a period of three decades prior to Sumner's entry on the land. . . . The use described by Hermon is not only vague, it can be accurately described as "infrequent and sporadic" . . . Thus, although I find that some persons used a trail (or trails) across the Sumner property prior to his entry, their use did not constitute public acceptance of the grant.

These findings are not an accurate summary of the testimony. Hermon testified that he and all his "brothers, neighbors, and relatives" regularly used the trail for hunting in the spring and fall between 1942 and 1960. He regularly used the trail in the winter for trapping during those years, and occasionally saw others on the trail when running his trap lines. Hermon testified that prospectors, at least six of whom he could name, used the trail to access their claims. Al Frey also testified that prospectors had used the trail. The "at one time or another" quote in the superior court's findings is used out of context. In

response to a question about how many people were mining on Metal Creek, Hermon testified, "I suppose that all those people around Matanuska there at one time or another were up there trying to find some gold in there."

The court's finding that "[t]he trail Hermon used 'went along the bank' " also is misleading to the extent that it suggests that the trail he used was not on USS 5265. On rebuttal, Hermon did testify that the trail he used didn't start in the same place as Sumner's driveway. However, he also testified that the trail he remembered began on the parcel, continued on the property to where Sumner built his cabin, and may have connected with the driveway at some point along the trail.

In any event, it is not necessary, as the trial court appears to suggest in its findings, that the precise path of the trail be proven. It is enough for one claiming an RS 2477 right-of-way to show that there was a generally-followed route across the land in question. *See Shultz*, 10 F.3d at 655. That much Fitzgerald has shown.

The conclusion that the property was used regularly before 1965 to gain access to the lands beyond it gains even greater vitality in light of the testimony from Herman and Frey, as well as the defendants, that the route through the property was the only practical way to reach these lands.[3]

---

3. Connor and Dennis Illies on one occasion when they were prevented by force of arms from passing through USS 5265, did travel up to their claims using a different route. Although the plaintiffs referred to this route as an alternative access, Connor's and Illies' testimony was that they used the route only once, that it was dangerous, and that they could not use it to travel back down to the bottom of the trail.

In our view, Fitzgerald has shown public use "for such a period of time and under such conditions as to prove that the grant has been accepted." The facts here are considerably more compelling than those presented in *Hamerly*. This is not a case of "infrequent and sporadic" or "desultory"[4] use of a "dead end road or trail". *Hamerly*, 359 P.2d at 125. Rather, the evidence demonstrates the public regularly used the trail to travel from the river bed to Metal Creek and to the lands and mining claims (definite termini) beyond USS 5265. In the parlance of precedent, the trail was "necessary or convenient for the accommodation of the public." *Id.*

IV. *CONCLUSION*

Fitzgerald has demonstrated that the public accepted the statutory grant of right-of-way prior to entry. Therefore, we hold that there is a public right-of-way through USS 5265. Accordingly, we REVERSE the superior court on this issue, VACATE the court's award of attorney's fees, and REMAND the case to the superior court for a determination of the precise location and extent of the right-of-way.[5]

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4. "Desultory: 1. Marked by lack of order or planning: disconnected 2. Occurring haphazardly: random." *Webster's II New Riverside University Dictionary* (1984).

5. Because of our holding, we do not address Fitzgerald's claim for a new trial.

Supreme Court, U.S.
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No. 97-1117

In the Supreme Court of the United States

OCTOBER TERM, 1997

PAUL G. SHULTZ, PETITIONER

v.

DEPARTMENT OF THE ARMY

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

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QUESTIONS PRESENTED

Revised Statutes 2477 (1875), a former provision of federal law commonly known as R.S. 2477, previously codified at 43 U.S.C. 932 (1970), and repealed in 1976 subject to a savings provision in the Federal Land Policy Management Act of 1976, 43 U.S.C. 1701, granted "[t]he right of way for construction of highways over public land, not reserved for public uses." Under R.S. 2477, lands on which highways had been constructed before their segregation from the public domain are deemed to be encumbered by public highway rights-of-way. Petitioner, who owns property near Fort Wainwright, a United States Army installation in Alaska, sued under the Quiet Title Act (QTA), 28 U.S.C. 2409a, to quiet title in public highway rights-of-way through Fort Wainwright along some of the current roads constructed by the Army. This case presents the following questions:

1. Whether the QTA authorizes a suit against the United States by a private party to quiet title in alleged public highway rights-of-way.

2. Whether petitioner failed to meet his burden of proving the existence of a continuous route of travel between Fairbanks and petitioner's property during the period in which the lands were in the public domain, and thereby failed to establish the existence of a public highway right-of-way under R.S. 2477 between Fairbanks and petitioner's property.

3. Whether petitioner's claim is barred by the QTA's statute of limitations.

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OPINIONS BELOW

The opinion of the court of appeals on the government's petition for rehearing (Pet. App. 1a-4a), from which review is sought, is reported at 96 F.3d 1222. The initial decision of the court of appeals (Pet. App. 5a-32a), which was withdrawn on the government's petition for rehearing, is reported at 10 F.3d 649. The opinion of the district court (Pet. App. 35a-48a) is unreported. A previous decision of the court of appeals (Pet. App. 49a-60a) is reported at 986 F.2d 1157.

JURISDICTION

The initial judgment of the court of appeals was entered on November 30, 1993. The judgment of the court of appeals rendered on the government's petition for rehearing was entered on September 20, 1996. Petitioner filed a petition for rehearing 46 days later,

on November 5, 1996, on an ancillary issue raised in a separate but consolidated appeal. On October 8, 1997, the court of appeals granted petitioner's petition for rehearing and disposed of it by dismissing the ancillary appeal for lack of appellate jurisdiction. Pet. App. 63a. The petition for a writ of certiorari was filed on January 6, 1998. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1). Because of the timing of petitioner's petition for rehearing, there is a question of this Court's jurisdiction. See Sup. Ct. R. 13.3.[1]

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[1] Subsequent to the entry of judgment in the district court, the United States filed a notice to tax costs; petitioner opposed that request with respect to the cost of the physical preparation of maps. On January 28, 1992, the clerk of the district court awarded costs in the amount of $11,627.75, including an amount for reproduction of maps. On January 30, 1992, petitioner filed a motion to retax costs. On February 10, 1992, petitioner filed a timely notice of appeal of the district court's judgment on the merits, which appeal was assigned Ninth Circuit No. 92-35197. On April 20, 1992, a magistrate judge issued a minute order denying the motion to retax costs "without prejudice as this case is now on appeal." C.A. E.R. Tabs DS, 116, 126. Petitioner filed his opening brief on the merits on May 27, 1992, and included an argument that the award of costs to the United States for maps was improper. On May 19, 1992, petitioner filed a notice of appeal from the magistrate judge's order denying his motion to retax costs. That appeal was assigned Ninth Circuit No. 92-35580.

Petitioner requested that the court of appeals treat the two appeals as consolidated, and the court granted that request on August 25, 1992. The court of appeals subsequently treated both appeals as consolidated; its initial decision and its decision on the government's petition for rehearing bear both docket numbers. See Pet. App. 1a, 5a. The court's initial decision did not address petitioner's appeal from the award of costs, because that decision was favorable to petitioner. Nor, however, did its

STATEMENT

1. This case involves a claim by petitioner that there are public rights-of-way crossing Fort Wainwright, Alaska, a military reservation located east of Fairbanks. In Revised Statutes 2477 (1875) (hereinafter R.S. 2477), a former provision of federal law previously codified at 43 U.S.C. 932 (1970) and repealed in

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substitute decision favorable to the government address petitioner's appeal from the award of costs.

After the court issued its substitute decision on September 20, 1996, petitioner filed a petition for rehearing on November 5, 1996 (46 days later), bearing both docket numbers, requesting that the court address the costs appeal as well, but not seeking reconsideration of the court of appeals' merits decision. In an order issued on October 8, 1997, bearing the docket numbers of both appeals, the court dismissed petitioner's costs appeal for lack of appellate jurisdiction. Pet. App. 63a. The court of appeals did not issue the mandate on the consolidated appeals until October 16, 1997, after it denied petitioner's petition for rehearing. It appears, therefore, that the court of appeals may have treated petitioner's petition for rehearing as a petition for rehearing of the panel's decision on the merits (which had been consolidated with the costs appeal).

There is a question, however, whether petitioner's petition for rehearing was timely, for it was filed with the Clerk of the Ninth Circuit on the 46th day after issuance of the court's substitute decision, one day out of time under Federal Rule of Appellate Procedure 40(a). Under this Court's Rule 13.3, "if a petition for rehearing is *timely* filed in the lower court by any party, the time to file the petition for a writ of certiorari * * * runs from the date of the denial of the petition for rehearing or, if the petition for rehearing is granted, the subsequent entry of judgment." (Emphasis added.) Because petitioner's petition for rehearing may not have been timely filed, there is a question whether the petition for a writ of certiorari is timely. See generally *Missouri* v. *Jenkins*, 495 U.S. 33, 47-50 (1990).

1976 subject to a savings provision in the Federal Land Policy Management Act of 1976, 43 U.S.C. 1701, Congress granted "[t]he right of way for construction of highways over public land, not reserved for public uses." Pursuant to R.S. 2477, lands on which "highways" had been constructed before their segregation from the public domain or reservation for specific federal uses are deemed to be encumbered by public rights-of-way.

In the 1970s, petitioner acquired several adjoining parcels located to the east of (but not immediately adjacent to) Fort Wainwright. See Gov't Reh'g Pet. Tab B. The Fort was established by the United States beginning in 1937 through a series of Executive Orders, Public Land Orders and condemnations and purchases of private land. Those land orders and acquisition actions were made "subject to valid existing rights." Pet. App. 37a.

Petitioner's property cannot be reached directly from Fairbanks by public roads. The southern boundary of his property is the north bank of the Chena River; although there is a public highway along the south bank of the river, there is no bridge across the Chena in the vicinity of petitioner's property. Pet. App. 36a. A portion of Fort Wainwright lies between Fairbanks and petitioner's property, and petitioner's property may currently be reached from Fairbanks only by using roads that traverse Fort Wainwright. One can reach petitioner's property from Fairbanks by entering the western end of Fort Wainwright on Trainer Gate Road (also called Trainer Road), then continuing east inside the Fort until Trainer Gate Road intersects with River Road (previously called Tank Road), and then driving on River Road until it intersects with the beginning of Homestead Road, at

the eastern end of Fort Wainwright. Homestead Road then continues east beyond the Fort to petitioner's property and beyond, crossing Columbia Slough. Gov't C.A. Br. 4-5; Gov't Reh'g Pet. Tab B.

The Army regulates the use of the roads on Fort Wainwright. The Army has placed restrictions on access to the roads on the Fort by requiring the use of civilian decals on vehicles belonging to those who own parcels of land in the area to the east of the Fort. Those decals are intended to allow landholders east of the Fort to have ready motor vehicle access to their property on the roads through the installation. The Army also issues daily passes to visitors requiring motor vehicle entry onto the Fort. Gov't C.A. Br. 6-7.[2]

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[2] Petitioner has a history of violations of the Army's regulations governing use of the roads on the Fort, both before and after the initiation of this lawsuit, and at times he has been barred from use of the roads as a result of those violations. See C.A. Supp. E.R. Tab EG (reproducing U.S. Exh. EG, which summarizes the government's exhibits relating to petitioner's violations of both Army regulations and Alaska law). For example, in June 1981, petitioner was ordered not to reenter or be found within Fort Wainwright for a period of one year after the Army found that he had refused to comply with the directions of military police officials, assaulted a military policeman while the policeman was performing his duties, deliberately rammed a military vehicle with a truck, and violated post traffic regulations. *Id.* at 6-7. The Army nonetheless permitted petitioner to use installation roads with an Army escort and along a designated route, in light of petitioner's use of his parcel east of Fort Wainwright. *Id.* at 7. Petitioner violated the limited access order at least twice. *Ibid.* At the time that the district court made its findings of fact in this case, petitioner was barred from Fort Wainwright. Pet. App. 36a.

2. Petitioner contends that there is a public right-of-way through the Fort on a route consisting of portions of Trainer Gate Road, River Road, and Homestead Road, based on the alleged existence of a public highway between his property and Fairbanks before the establishment of Fort Wainwright, and that he therefore does not need the Army's permission to travel on those roads through the Fort. Pet. App. 11a. In 1986, petitioner filed an amended complaint alleging that several roads within the military reservation "came into existence as a public road or roads pursuant to the provisions of 43 USC § 932 [*i.e.*, R.S. 2477]." C.A. E.R. Tab 9, at 3. Petitioner claimed entitlement under the Quiet Title Act (QTA), 28 U.S.C. 2409a, "to a determination of the property rights of the various parties, including the State of Alaska and the public, of the hereinbefore described public road and/or roads." C.A. E.R. Tab 9, at 6.

The district court initially determined that petitioner's action was barred by the QTA's 12-year statute of limitations, 28 U.S.C. 2409a(g), see Pet. App. 51a-52a, but the court of appeals reversed and remanded for further proceedings, *id.* at 49a-60a. On remand, the district court rejected petitioner's claims on the merits after a five-day trial at which the court considered expert testimony, maps, aerial photographs, and documents concerning the existence and condition of roads and trails and the property status of the relevant lands dating back to the early 1900s. See Pet. App. 35a-48a.

The district court found that "[t]he Trainer Road/River Road/Homestead Road route does not correspond to routes which [petitioner] claims pre-dated the creation of Fort Wainwright." Pet. App. 36a. The district court also found that petitioner's predecessor

in interest, George Nissen, who homesteaded petitioner's property before the creation of Fort Wainwright, had not used an overland route to transport his crops to Fairbanks, but rather had used the Chena River for that purpose. *Id.* at 39a, 41a. Although the district court noted that a road called Wiest Road existed before the establishment of Fort Wainwright, it found that Wiest Road terminated in what is now the Fort, that it never reached petitioner's property, that it had long ago fallen into disuse and does not correspond to current roads, and that there had never been a road susceptible of wagon or motor vehicle use connecting petitioner's property and Wiest Road. *Id.* at 37a-38a, 40a. The court further found that, although "[a] trail and foot bridge * * * were built on land that was at one time part of Nissen's homestead[,] [they] do not constitute an RS 2477 right-of-way extension from the Wiest homestead to Nissen's homestead." *Id.* at 40a. In sum, the court found that petitioner "failed to prove the existence of any RS 2477 right-of-way or other right-of-way across Fort Wainwright which either alone or in combination with other rights-of-way provide access to [petitioner's] property east of Fort Wainwright." *Id.* at 48a. The court also concluded again that petitioner's action was barred by the statute of limitations. See *ibid.*

3. The court of appeals initially reversed, concluding that petitioner had shown the existence of a right-of-way before the establishment of Fort Wainwright. Pet. App. 1a-32a; see *id.* at 31a. The court rejected as irrelevant what it perceived to be the premise of the district court's decision, namely that "no road broad enough to accommodate a wagon cut across present day Fort Wainwright before the

surrounding land was validly withdrawn from the public domain." *Id.* at 19a. First, the court concluded, the district court had erred in finding that petitioner's predecessor in interest, Nissen, had used the Chena River to transport his crops to Fairbanks. *Id.* at 19a-20a. Second, the court held that the use of a wagon was not necessary to establish the existence of an R.S. 2477 right-of-way, and that "[a]s a legal matter, the barest foot trail may qualify for RS 2477 status. The condition of the 'highway'—whether paved or wagon-worthy, or simply a 'minor footpath'—is irrelevant if the claimant can show that the right of way was used no matter for what purpose." *Id.* at 20a. The court stressed that "conditions in Alaska present unique questions * * * [d]ue to its geography, its weather, and its sparse and scattered population" (*id.* at 13a); and that, under its reading of Alaska law concerning proof of the existence of an R.S. 2477 right-of-way, "as long as the termini of the right of way are fixed * * * , to establish public right of way the route in between need not be absolutely fixed (as it might be in other settings)" (*id.* at 14a). According to the court of appeals, "[r]ight of access is the issue, not the route" (*ibid.*), and "[w]hat matters is that there was travel between two definite points" (*id.* at 21a).

The court of appeals noted that the district court had found that Nissen used Wiest Road to travel to Fairbanks; it also found evidence of "a footbridge on Nissen's property suggesting a foot trail leading west to Fairbanks." Pet. App. 23a. Thus, the court concluded, "[a]ll the evidence points to the existence of a publicly used land route between the Nissen homestead and town" before the establishment of Fort Wainwright. *Id.* at 24a. And although the court acknowledged that not "every segment of the trail

qualified for RS 2477 status, either because a homesteading claim clearly displaced that portion of the claimed RS 2477 right of way, or because there might be homesteading rights that would trump an RS 2477 claim," it nonetheless rejected the district court's finding that "no RS 2477 [right-of-way] existed across present-day Fort Wainwright." *Id.* at 25a-26a.[3]

Finally, the court of appeals rejected the district court's conclusion that petitioner's claim was barred by the QTA's statute of limitations. Pet. App. 28a-31a. Although the district court had found that a section of Wiest Road had long been obstructed by a landfill on Fort Wainwright, which should have alerted petitioner or his predecessor in interest to the United States' claim to absolute control of that part of the land and thereby started the limitation period running, see *id.* at 38a, the court of appeals was of the view that the Army's obstruction of Wiest Road was irrelevant because "[o]ne continuous route" across Fort Wainwright exists at the present, *id.* at 30a. Thus, the court of appeals stated, "whatever obstruction to the historical route [the] landfill represents, it does not in fact obstruct the modern

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[3] The court of appeals noted that petitioner had offered "a number of common law theories to support his position that the Army took land burdened by preexisting rights." Pet. App. 26a. Petitioner, it stressed, had argued both that an R.S. 2477 right-of-way existed across Fort Wainwright and also that a "public prescriptive easement" existed before 1937. *Ibid.* The court also relied on case law involving *private* easements, and noted that under Alaska law, "[t]he fact that the easement is shared does not defeat [such a] claim." *Id.* at 27a-28a. Based on its review of the record, the court found that "the trail roughly following the river" was passable year-round and that "at the very least an easement by prescription took hold." *Id.* at 28a.

right of way across the base[,]" and "[o]nly when present day patterns of travel across the base are interfered with is it proper to charge individuals with the knowledge of the government's claim over that route." *Ibid.*[4]

4. a. The government filed a petition for rehearing, arguing that the panel had erroneously adopted unprecedented, relaxed standards for the establishment of R.S. 2477 rights-of-way and prescriptive easements, which standards would fundamentally hinder the ability of landowners to know that such encumbrances exist on their property and to manage their property accordingly. The government also argued (a) that petitioner, as a private person without any property interest in the asserted public highway right-of-way across Fort Wainwright, has no cause of action under the Quiet Title Act (QTA), 28 U.S.C. 2409a, to quiet title to the alleged public right-of-way; (b) that a proponent of an R.S. 2477 right-of-way may not establish the existence of a right-of-way merely by showing that there was opportunistic travel along unknown routes across public domain land between fixed termini, without proving that a continuous highway had existed between those termini; and (c) that petitioner had not established any private prescriptive easement crossing Fort Wainwright. See Gov't C.A. Reh'g Pet. 5-15.

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[4] The government also argued on appeal that, even if petitioner had established the existence of a public highway right-of-way across Fort Wainwright, the Army's requirement of civilian decals was nonetheless a reasonable regulation of that right-of-way. See Gov't C.A. Br. 13-15. The court of appeals did not address that argument.

b. After a second oral argument, the panel withdrew its prior opinion and substituted in its place an opinion affirming the district court's judgment. Pet. App. 3a-4a. In its substitute opinion, the court "agree[d] with the district court that [petitioner] has not sustained his burden to factually establish a continuous R.S. 2477 route or a right-of-way under Alaska common law." *Id.* at 4a. Because it rejected petitioner's claim on the merits, the court of appeals declined to address the issue of the statute of limitations. *Ibid.*

ARGUMENT

Petitioner contends that the court of appeals erred in concluding that the existence of a wagon-quality road was necessary to establish a public highway right-of-way before the withdrawal of public lands on Fort Wainwright, and that the court of appeals' decision on that basis conflicts with decisions of the Alaska Supreme Court. The court of appeals did not, however, base its decision on rehearing on the existence *vel non* of a wagon-quality road, but rather concluded that petitioner had failed to establish any continuous route crossing land that is presently on Fort Wainwright, such that a pre-existing public highway right-of-way should be recognized. That fact-bound conclusion is fully supported by the record, and raises no important issue of federal law warranting this Court's review. Moreover, petitioner, as a private party, may not invoke the QTA to quiet title in a public right-of-way, and any such claim by petitioner is in any event barred by the QTA's statute of limitations. Further review is therefore not warranted.

1. a. Petitioner contends (Pet. 10) that the lower courts erred in requiring him to prove a "wagon road" to his property, following "an exact route and location," in order to establish the existence of a public highway predating Fort Wainwright. The lower courts, however, based their decision on the absence of a showing that there was *any* continuous route across the relevant land predating Fort Wainwright, whether footpath or wagon road. Thus, petitioner's argument that the lower courts erred in ruling that the existence of a footpath would be insufficient to establish an R.S. 2477 public highway is not presented by this case.[5]

For the same reason, petitioner's contention that the decision below conflicts with the Alaska Supreme Court's decision in *Fitzgerald* v. *Puddicombe*, 918 P.2d 1017 (1996) (reproduced at Pet. App. 64a-75a), is without merit. Although the Alaska Supreme Court stated in that case (relying in part on the now-withdrawn opinion of the court below) that "even a rudimentary trail can qualify" as a public highway

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[5] Petitioner argues in particular that the district court improperly required a showing of a wagon road to establish an R.S. 2477 right-of-way (Pet. 10), but it is far from clear that the district court enunciated such a requirement. The district court, rather, rejected petitioner's own speculation that Nissen must have established a right-of-way on Homestead Road in order to take his produce by wagon to Fairbanks from his property. The district court noted both the absence of a bridge to cross a large slough between Nissen's and Wiest's homesteads (Pet. App. 39a), and the fact that "[i]f a trail or road had existed to Nissen's homestead in 1911, it is unlikely that the section line calls of the survey * * * would have missed it" (*id.* at 40a). Petitioner did not challenge either of those factual findings as clearly erroneous on appeal.

under R.S. 2477, see 918 P.2d at 1020,[6] it did not express doubt that an actual trail between two termini must have existed, and the evidence in that case established that at least one "well-defined trail" following an "established route" existed at the relevant time, *ibid.* In *Fitzgerald*, the court determined that, in fact, there had been trails established at least roughly following the route of the right-of-way claimed in that case. *Id.* at 1021. Here, the court of appeals held that petitioner had not factually established the necessary "continuous route" to prove the existence of an R.S. 2477 right-of-way. Nothing in *Fitzgerald* indicates that the Alaska Supreme Court disagrees with the court of appeals' decision in this case that a plaintiff claiming the existence of an R.S. 2477 right-of-way has the burden to establish the existence of a continuous route that was created when the land was in the public domain.

Although the Alaska Supreme Court stated in *Fitzgerald* that an R.S. 2477 route must run between two "definite termini," 918 P.2d at 1020, that court has never stated that the proponent of a right-of-way need *only* show that there was opportunistic travel along

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[6] The *Fitzgerald* court also cited *Dillingham Commercial Co.* v. *City of Dillingham*, 705 P.2d 410 (Alaska 1985), for the proposition that "even a rudimentary trail can qualify," 918 P.2d at 1020, but the *Dillingham* case does not stand for that proposition. In that case, the evidence established that a trail had evolved into a "road * * * used by the public to haul freight to and from the beach." 705 P.2d at 414. Thus, other than *Fitzgerald*, the only authority for the proposition that a footpath is sufficient to establish an R.S. 2477 right-of-way is the vacated decision of the court of appeals in this case. Now that that decision has been superseded, the Alaska Supreme Court may reconsider its reliance on it in the future.

unknown routes between two termini, without also showing the creation of a continuous route between those termini while the land was in the public domain. The existence of definite termini is a necessary but not sufficient condition for establishment of an R.S. 2477 right-of-way. And although the Alaska Supreme Court also stated in *Fitzgerald*—relying on the vacated decision of the court of appeals in this case—that "it is not necessary * * * that the precise path of the trail be proven," 918 P.2d at 1021 (citation omitted), that language was unnecessary to the decision in *Fitzgerald*, in which clear trail paths were proven. It is uncertain, moreover, that the Alaska Supreme Court would adhere to that dictum in a future case, now that the decision on which it relied for that proposition has been vacated.

b. The record fully supports the conclusion that no continuous route—even a definite footpath—had been established across public domain lands where the Army subsequently constructed either Homestead Road (the eastern portion of petitioner's claimed right-of-way) or Trainer Road (the western portion of his claimed right-of-way). See Gov't C.A. Br. 23-30, 43; cf. *Adams* v. *United States*, 3 F.3d 1254, 1258 (9th Cir. 1993) (upholding determination that no right-of-way existed where testimony showed that "whatever road existed [in the past], the [present] road is no longer in the same location as that historical road"). While it was undisputed that petitioner's predecessor in interest, George Nissen, occasionally traveled overland between his homestead and Fairbanks, there was no evidence at trial of any continuous route on which he had traveled, much less a continuous route that coincides with the right-of-way claimed by petitioner.

The only documentary evidence of roads or trails in that area when a public right-of-way would likely have been created was a 1911 survey prepared by the General Land Office, but that survey identified no roads or trails between Nissen's homestead and that of Wiest, Nissen's nearest neighbor one mile to the west. See Gov't C.A. Supp. E.R. Tab AH-1; Gov't C.A. Br. 23. Petitioner's own witness Robert Buzby—an 80-year old man who stated that he had traveled extensively throughout the area—testified that there was no road or trail between Wiest's and Nissen's homesteads, "[j]ust open country." See *id.* at 24. And expert witnesses for both parties testified that aerial photographs taken immediately after the establishment of Fort Wainwright showed no road or trail in the area. See *id.* at 25 (noting that petitioner's expert "couldn't identify" Homestead Road in 1938 aerial photographs); Gov't C.A. Supp. E.R. Tab F. In sum, petitioner failed to carry his burden of persuasion that a continuous route had been established between his property and the western end of Fort Wainwright before the Fort was established. See also *Andrus* v. *Charlestone Stone Prods. Co.*, 436 U.S. 604, 617 (1978) (noting that doubts about the availability of a federal grant in particular circumstances "are resolved for the [g]overnment") (citation omitted); *California ex rel. State Lands Comm'n* v. *United States*, 457 U.S. 273, 287 (1982) ("federal grants are to be construed strictly in favor of the United States").[7]

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[7] There also is no merit to petitioner's suggestion (Pet. i, 11-12) that this Court's review is warranted by the fact that the court of appeals withdrew a lengthy opinion and substituted for it a short opinion. After a second oral argument before the panel, the court of appeals correctly held that petitioner had "not sustained his burden to factually establish a continuous

2. Review by this Court also is unwarranted because there was no statutory authorization for the courts below to entertain petitioner's claims of public rights-of-way across Fort Wainwright. The QTA provides a limited waiver of federal sovereign immunity to permit the initiation of a civil action "to adjudicate a disputed title to real property in which the United States claims an interest." 28 U.S.C. 2409a(a). The QTA requires that "[t]he complaint shall set forth with particularity the nature of the right, title, or interest which the plaintiff claims in the real property, [and] the circumstances under which it was acquired." 28 U.S.C. 2409a(d). Congress thus permitted challenges to the United States' claim of title to real property only by parties who themselves arguably have a property interest in that same property.

Petitioner was not entitled to bring a suit against the United States under the QTA to quiet title to alleged public roads because he has no property interest in public roads. As the Tenth Circuit stated in *Kinscherff* v. *United States*, 586 F.2d 159, 160-161 (1978), "[m]embers of the public as such do not have a 'title' in public roads. To hold otherwise would indicate some degree of ownership as an easement. * * * [T]he 'interest' plaintiffs seek to assert as part of the public is not of such a nature to enable them to bring a suit to quiet title."[8] Whereas governmental entities

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R.S. 2477 route." Pet. App. 4a. That determination was sufficient to dispose of the matter presented.

[8] Although the Tenth Circuit has held that an individual may use the QTA to assert claims of *private* easements across federal property, see *Kinscherff*, 586 F.2d at 161, petitioner's amended complaint claimed only *public* R.S. 2477 rights-of-way across Fort Wainwright. See C.A. E.R. Tab 9. Nor does peti-

might have a cause of action against the United States under the QTA to quiet title in R.S. 2477 public rights-of-way, private persons such as petitioner, who claim only the same benefit to public rights-of-way as that allegedly shared by all members of the general public, do not have a claim to a "right, title, or interest" of the sort necessary to invoke the QTA's mechanism for suits against the United States.

Petitioner's amended complaint claimed certain roads as public highways under R.S. 2477, and invoked the QTA to obtain "a determination of property rights of the various parties, including the State of Alaska and the public, of the hereinbefore described public road." C.A. E.R. Tab 9, at 1-2, 6. The State and "the public" are not parties to this lawsuit, however, and the QTA does not authorize an individual to sue the United States to determine a State's property rights in alleged public roads. Accordingly, the court of appeals' judgment was correct because the QTA provided no basis for a judicial decision on petitioner's claims.

3. Finally, review should be denied because petitioner's claim in any event is barred by the QTA's statute of limitations, 28 U.S.C. 2409a(g). That provision requires a plaintiff under the QTA to bring suit within 12 years after his claim accrues, defined as the date on which the plaintiff or his predecessor in interest knows, or should know, of the United States' claim to the land at issue. *Ibid.* Since this action was brought in 1986 (see Pet. App. 29a), any claim that accrued before 1974 is barred.

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tioner present in his certiorari petition any question concerning the existence of a private easement. See Pet. i, 7-13.

When the panel below initially reversed the district court, it relied heavily on the fact that Wiest Road was sometimes used by homesteaders in the area, including Nissen, to reach Fairbanks. Pet. App. 23a. Thus, if petitioner has a claim to a right-of-way, that claim must rest in large part on the existence of Wiest Road (even though Wiest Road never reached all the way to the land that is now his property). The district court found, however, that even if Wiest Road ever was an R.S. 2477 right-of-way, any claim on that basis was barred by the statute of limitations because the Army obstructed Wiest Road by the Fort Wainwright sanitary landfill before 1974 and continuously thereafter. *Id.* at 38a. Any attempt by petitioner or his predecessor in interest to use the part of the alleged right-of-way that corresponded to Wiest Road should have led him to realize that the Army claimed that land and was preventing access to it by others. Cf. *Park County, Montana* v. *United States*, 626 F.2d 718 (9th Cir. 1980) (sign and rock barrier alerting public that they were entering national forest where motor vehicles were prohibited constituted notice sufficient to apprise reasonable person of United States' claim), cert. denied, 449 U.S. 1112 (1981). Accordingly, petitioner's claim is barred by 28 U.S.C. 2409a(g).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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No. 97-1117

In The

Supreme Court of the United States

October Term, 1997

PAUL G. SHULTZ,

Petitioner,

v.

DEPARTMENT OF ARMY,
UNITED STATES OF AMERICA,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

BRIEF OF AMICUS CURIAE UTAH ASSOCIATION OF COUNTIES IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

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I

INTRODUCTION[1]

The final opinion of the United States Court of Appeals for the Ninth Circuit in this case, *Shultz v. Army*, 96 F.3d 1222 (9th Cir. 1996) (*Shultz III*), eviscerates Alaska state law as applied to rights-of-way perfected under the grant of 43 U.S.C. § 932 (R.S. 2477). The steps leading up to this decision, clearly at odds with the Alaska Supreme Court's ruling in *Fitzgerald v. Puddicombe*, 918 P.2d 1017 (Alaska 1996), suggest that the Ninth Circuit Court's action is part of a trend towards a substitution of arbitrary federal power for the rule of law when dealing with these vested property rights. The Utah Association of Counties (UAC) believes that it is important for this Court to address the Ninth Circuit Court's disregard for established Alaska law, thereby sending a clear message that federally created estates on public lands will be protected by established law.

UAC's interest in the subject of this litigation arises from the considerable interest among the counties of rural Utah in protecting their ability to maintain the transportation infrastructure that has been delegated to their authority by the state of Utah.[2] UAC is a non-profit

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[1] The parties have consented to the filing of this brief.

Counsel for a party did not author this brief in whole or in part. No person or entity, other than the *Amicus Curiae*, its members, or its counsel made a monetary contribution to the preparation and submission of this brief.

[2] UAC participated by the filing of an *amicus curiae* brief in connection with the petition for rehearing in this matter before the United States Court of Appeals for the Ninth Circuit and as

Utah corporation whose membership is comprised of each of the counties and the elected officials of each county of the State of Utah.[3]

II.
DISCUSSION

In order to provide some perspective on the case currently before the Court, UAC will present some of the history pertaining to the fluctuating and increasingly hostile federal treatment of rights-of-way granted under R.S. 2477, as trends in this country have changed over the years.

The traditional and appropriate management of the local transportation infrastructure where it crosses federally owned lands has been under increasing attack, first from environmental groups and, since 1992, by the federal land managing agencies. This trend can be seen, perhaps, as a continuation of the larger trend away from divestment of the public domain towards preservation of

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amicus curiae in *Sierra Club v. Hodel*, 848 F.2d 1068 (10th Cir. 1988) and related proceedings, addressing the law of rights-of-way granted under R.S. 2477.

[3] UAC's interest in this matter is not just academic. Within the past two years, several rural Utah counties have been sued in trespass by federal agencies and environmental groups for conducting maintenance activities on county roads which traverse the federal domain. While space does not permit a lengthy presentation of the considerations raised by those cases, UAC believes that they represent an effort to overwhelm rural counties poorly equipped, financially and otherwise, to defend against a multiplicity of trespass claims arising from unprecedented interpretations of law.

the public domain, which began in earnest on October 21, 1976, with the passage of the Federal Land Policy and Management Act of 1976 (FLPMA), 43 U.S.C. §§ 1701 *et seq. See, e.g., Hodel*, 848 F.2d at 1078. FLPMA repealed R.S. 2477, but explicitly protected rights-of-way already perfected.[4] In any event, the express direction of Congress to honor valid existing rights has recently begun fading from federal administrative consciousness.

A.

THE LEGAL PRINCIPLES DEVELOPED AROUND R.S. 2477 ARE CLEAR

Up until now, the state and federal courts have staunchly protected R.S. 2477 rights-of-way in accordance with common law and common sense. Accordingly, the law developed around R.S. 2477 recognizes the following principles:

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[4] FLPMA contained the following explicit provisions:

> All actions by the Secretary concerned under this Act shall be subject to valid existing rights.

43 U.S.C. § 1701 note (h).

> Nothing in this Act [see Short Title note set out above], or in any amendment made by this Act, shall be construed as terminating any valid lease, permit, patent, right-of-way, or other land use right or authorization existing on the date of approval of this Act [Oct. 21, 1976].

43 U.S.C. § 1701 note (a).

> Nothing in this title shall have the effect of terminating any right-of-way or right-of-use heretofore issued, granted or permitted.

43 U.S.C. § 1769(a).

(1) R.S. 2477 must be interpreted in accordance with the intentions of the Congress which passed the law. *Hodel*, 848 F.2d at 1082. *See also, Leo Sheep Co. v. United States*, 440 U.S. 668, 681-82 (1979).

(2) The term "highway" must likewise be interpreted as understood in 1866 and in accordance with state law. *Central Pacific Railway Co. v. Alameda County*, 284 U.S. 463, 467, 472-473 (1932).

(3) As recognized in *Shultz III*, the provisions of R.S. 2477, insofar as they pertain to the method of perfection and the scope of the right-of-way, must be interpreted in accordance with the law of the state where the statute is being applied. *Hodel*, 848 F.2d at 1083. The Department of Interior recognized this fundamental principle until recently. *See*, 43 C.F.R. § 244.55 (1938); 43 C.F.R. §§ 2822.1-1, 2822.2-1 (1974).

In Alaska, as in other states, while a highway under R.S. 2477 must be open to the public to come and go freely at will, it could be a footpath, horse trail, or a road passable by horse wagons or motor vehicles. *Alameda County*, 284 U.S. at 467. (Highways under 43 U.S.C. § 932 can also be roads "formed by the passage of wagons, etc., over the natural soil."). *Wilkenson v. Dept. of Interior*, 634 F.Supp. 1265, 1272 (D. Colo. 1986). ("The trails and wagon roads over the lands which became part of the Colorado National Monument were sufficient to be 'highways' under 43 U.S.C. § 932.")

These decisions were consistent with the legal definition of the term "highway:"

> The term highway is the generic name for all kinds of public ways, whether they be carriage-

> ways, bridle-ways, footways, bridges, turnpike roads, railroads, canals, ferries, or navigable rivers. Bouv. Law Dict., Rowle's Third Rev. p. 1438, Tit. Highway; Elliott, Roads and Streets, p. 1; 25 Am.Jur., 340.

Parsons v. Wright, 27 S.E.2d 534, 536 (N.C. 1943)

Where state law so provided, a public highway could be created by use alone. " 'User is the requisite element, and it may be by any who have occasion to travel over public lands, and if the use be by only one, still it suffices.' " *Wilkenson*, 634 F.Supp. at 1272 (quoting *Leach v. Manhart*, 102 Colo. 129, 133, 177 P.2d 652, 653 (1938)). Clearly, the established law allows for vesting of highway rights-of-way by any means authorized by state law.

The *right* of access, in the minds of some, runs counter to the desire to preserve the public lands from the potential effects of human intrusion. Thus, R.S. 2477 rights-of-way have become, over the years, a focal point for those who would see the public lands cut off from the public and returned to some perceived state of "primeval" character. But for the people of the rural West, who have set their roots over the generations into rugged areas with few routes of access to and across vast stretches of federal domain,[5] these same rights-of-way form the backbone for human connections, commerce and enjoyment of their heritage.

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[5] Approximately 67% of the lands within the borders of the State of Utah are owned by the federal government. In Garfield County, approximately 93% of the lands are federally owned.

B.

RECENT ACTIONS HAVE ATTEMPTED TO UNDERCUT THE ESTABLISHED LAW

The onslaught against R.S. 2477 rights-of-way began in earnest in the 1980's, most notably in Utah with a case filed by the Sierra Club, the National Parks and Conservation Association (NPCA), the Southern Utah Wilderness Alliance (SUWA), and the Wilderness Society in 1987 to stop a road improvement project on a remote rural highway which has become popularly known as the "Burr Trail" Road. *Sierra Club v. Hodel*, 675 F.Supp. 594 (D. Utah 1987); 848 F.2d 1068 (10th Cir. 1988) represented a concerted effort by environmental groups to change or reinterpret the law of R.S. 2477 which, if it had been successful, would have terminated or severely restricted hundreds of traditional access routes forming a public highway system serving the general public.

Sierra Club *et al.* were largely unsuccessful in their claims in *Hodel*.[6] As recited above, the courts ruled, consistently with the well-established body of law and then-existing federal regulations and other guidance, that state law governs both the perfection and scope of R.S. 2477 rights-of-way and that traditional principles of the common law of easements should be looked to when resolving questions about these property rights. 848 F.2d at 1083, 1087.

Not long after Secretary of Interior Bruce Babbitt took office, a concerted effort was undertaken to rewrite

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[6] The road improvement project under attack in that case has been completed.

the agency-made guidance pertaining to R.S. 2477 rights-of-way, beginning with a directive to the Bureau of Land Management to refuse to acknowledge any R.S. 2477 rights-of-way, except where the right-of-way holder has shown "a compelling and immediate need to have a road acknowledged as a R.S. 2477 highway" (Bureau of Land Management Instruction Memorandum No. 93-113, January 22, 1993)[7], and culminating in the publication of draft regulations purporting to govern R.S. 2477 rights-of-way in 1994 (59 Fed. Reg. 39,216 (1994)). The draft regulations took a very aggressive posture against these rights-of-way, which amounted to an about face from the current agency regulations which have been on the books since 1938. *See*, Hjelle, *Ten Essential Points Concerning R.S. 2477 Rights-of-Way* and *Reply to Mr. Lockhart: An Explanation of R.S. 2477 Precedent*. 14 Journal of Energy, Natural Resources & Environmental Law 301, 349 (1994).

The regulations proposed by Secretary Babbitt provoked an outcry throughout the West, and have never been finalized. In fact, Congress expressed its intent to protect these valid existing property rights from the excesses of administrative overreaching by passing Section 108 of the Department of Interior and Related Agencies Appropriations Act, 1997, which provided:

> No final rule or regulation of any agency of the federal Government pertaining to the recognition, management, or validity of a right-of-way pursuant to Revised Statute 2477 (43 U.S.C. 932) shall take effect unless expressly authorized by

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[7] Document 1 lodged with the Clerk of the Court on March 9, 1998.

> an Act of Congress subsequent to the date of enactment of this Act [Sept. 30, 1996].

43 U.S.C.A. § 932 Savings Provisions (1998).

In spite of the Congressional moratorium, Secretary Babbitt has revoked existing Department of Interior policy, substituting a new policy entirely inconsistent with the established law of R.S. 2477 and current Departmental regulations pertaining to R.S. 2477, and putting into effect the very principles that Congress had prohibited him from promulgating through the legitimate regulatory process. Memorandum from Secretary of Interior to Assistant Secretaries (January 22, 1997) regarding "Interim Departmental Policy on Revised Statute 2477 Grant of Right-of-way for Public Highways; Revocation of December 7, 1988 Policy."[8]

Meanwhile, Paul G. Shultz had been quietly marshaling the facts and the law to show that a valid R.S. 2477 right-of-way had been established across the lands subsequently encompassed by Fort Wainwright. The Court of Appeals for the Ninth Circuit, initially applying the law as it stood, found in his favor in *Shultz v. Army*, 10 F.3d 649 (9th Cir. 1993) (*Shultz II*). *Shultz II*, albeit consistent with the large body of law on R.S. 2477, was apparently perceived by the Department of Interior to be adverse to the new agenda for environmental interests. The Department of Interior, through its solicitor, John Leshy, joined in the Department of the Army's petition for rehearing before the Ninth Circuit Court, articulating the new R.S.

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[8] Document 2 lodged with the Clerk of the Court on March 9, 1998.

2477 agenda, and the NPCA, the Wilderness Society, the Audubon Society, SUWA, the Sierra Club and the Northern Alaska Environmental Center followed suit with a joint amicus curiae brief.[9] The result, as now before this Court, was an inexplicable reversal by the Ninth Circuit Court.

The temptation of federal bureaucrats and special interest groups to overlook the law of the State of Alaska in favor of an interpretation which supports the exercise of federal administrative power without consideration for intervening property rights and which satisfies currently popular political goals is understandable. But such an inexplicable diversion from settled law into judicial activism should not be countenanced from the courts. The selective choice to disregard the law of the state of Alaska represents a significant danger to the rule of law.

III.

CONCLUSION

UAC respectfully suggests to this Court that, if given an opportunity to more fully present the history and the law pertaining to R.S. 2477 rights-of-way, it will be clear that *Shultz II* was the proper decision and *Shultz III* can only be viewed as the first step away from the rule of law by a federal court dealing with R.S. 2477, a step which must be checked before the public is denied access to

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[9] Four of these groups, NPCA, SUWA, the Sierra Club, and the Wilderness Society were the same groups who initiated the R.S. 2477 controversy in Utah with the filing of *Hodel*.

vested western transportation networks. UAC respectfully requests this Court to grant Paul G. Shultz's petition for a writ of certiorari, to correct a decision of the Ninth Circuit Court which is clearly in conflict with the law set forth by the Alaska Supreme Court.

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PAUL G. SHULTZ,

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DEPARTMENT OF ARMY,
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Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

BRIEF OF *AMICUS CURIAE* IN SUPPORT OF PETITIONER

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INTEREST OF AMICUS CURIAE

Within the United States, Alaska is the last frontier. Like other western states, much of the early settlement and development of its territory has been facilitated by acts of Congress inviting entry onto federal lands. Making their way by foot, horse, boat, wagon or dogsled, homesteaders and prospectors were the first trailblazers across what remains rugged terrain. To encourage the tide of settlement and development of the western frontier, Congress, in a section of its mining laws of 1866, provided a self-executing grant of rights of way across unreserved public lands for the construction of highways. This statute has come to be known as Revised Statute (RS) 2477. 43 U.S.C. § 932.[1]

In Alaska and other western states, RS 2477 fostered the development of a public transportation network by securing crucial, albeit often primitive, links between various claims, homesteads, and settlements.[2] Since the RS 2477 grant was self-executing, operative upon acceptance by the proper authority or public user, use of the highways proceeded without documentation. There are hundreds of claims of historic RS 2477 rights of way in Alaska which may yet be brought before the courts for

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[1] The statute was repealed on October 21,1976, subject to valid existing rights. Federal Land Policy and Management Act, Pub. L. No. 94-579, Sections 701, 706(a), 90 Stat. 2793 (Oct. 21, 1976) and Sec. 509, 90 Stat. 2781 (codified at 43 U.S.C. 1769).

[2] Even today, many of Alaska's public roads and highways are not fit for travel by ordinary passenger cars. Yet these rustic transportation corridors are widely relied upon by Alaskans and are critical to the State's economic development and aesthetic enjoyment.

validation[3] as Alaskans are forced to defend rights of access taken for granted by property owners in the rest of the nation.

As both a landowner and representative for the public's right to access public highways, the State of Alaska has a profound interest in the interpretation of RS 2477, and in guarding against a dilution of the statute's promise. As with most western states, title to much of the land within Alaska's borders is derived from or remains in the federal government. Continued access across land now in private hands or in federal ownership is essential to continued development in Alaska. As a young state with vast territory and uncharted potential, it is crucial to the future of the state that it defend its vested rights of way under RS 2477. The decisions below misapply the law and offer little guidance to future courts. This Court should grant certiorari to illuminate the path to be followed in resolving this and future disputes by offering its interpretation of the scope of the RS 2477 grant and the requirements for acceptance.

SUMMARY OF ARGUMENT

The decision by the Ninth Circuit Court of Appeals raises questions as to the scope of Congress' offer of rights of way to those frontiersmen answering the call to "go west." Turning its back on history, the Ninth Circuit decision suggests a restriction of the grant which would

[3] No court action is required for validation if agreement can be reached with the owner of the servient estate.

burden claimants with requirements for acceptance foreign to the statute's purpose and Congress' intent, and in direct conflict with the decisions of the Alaska Supreme Court. Direction from this Court is needed not only to prevent legitimate RS 2477 routes from being foreclosed and the growth of western states stunted, but to provide a beacon for lower courts and potential litigants who would otherwise be lost trying to discern the law from the Ninth Circuit's cursory and vague decision. In the wake of the confusion wrought by the Ninth Circuit's inexplicable about-face in *Shultz v. Dep't of Army*, 96 F.3d 1222 (9th Cir. 1996), the Supreme Court should address itself, for the first time, to the scope of Congress' grant under RS 2477 and so further the orderly disposition of future RS 2477 claims.

ARGUMENT

I. The decision of the Ninth Circuit raises important questions of federal law as it narrows the scope of the grant under RS 2477 in conflict with the purpose of the act and decisions of the Alaska Supreme Court.

It is well settled that the scope of a grant of federal land is a question of federal law. *United States v. Gates of the Mountains Lakeshore Homes*, 732 F.2d 1411, 1413 (9th Cir. 1984). Moreover, unless a contrary intention is shown, it is assumed that the federal government has assented that its conveyance will be construed and given effect in accordance with the law of the state in which the land lies. *Oklahoma v. Texas*, 258 U.S. 594, 594-5 (1922); *See also United States v. Gates of the Mountains Lakeshore Homes*,

732 F.2d at 1413. The Tenth Circuit Court of Appeals provided a detailed analysis and history of the interpretation and appropriate rules of construction for RS 2477 in *Sierra Club v. Hodel*, 848 F.2d 1068, 1080-83 (10th Cir. 1988). The Tenth Circuit concluded that state law governs. *Id. See also Wilderness Society v. Morton*, 479 F.2d 842, 882 (D.C. Cir. 1973) (In dicta discussing rights of way for the construction of a haulroad supporting the Trans-Alaska pipeline, Alaska caselaw cited as authority describing the manner in which RS 2477 grant may be accepted.)

As in many other western states, Alaska law provides that the RS 2477 grant may be accepted by public user in accordance with state law or by a positive act on the part of proper authorities manifesting an intent to accept the grant. *Hamerly v. Denton*, 359 P.2d 121, 123 (Alaska 1961); *see also Kirk v. Schultz*, 119 P.2d 266 (Idaho 1941); *Bishop v. Hawley*, 238 P. 284, 285 (Wyo. 1925). The settled expectation has been that so long as a highway has been created under the laws of the state or the territory, a valid RS 2477 route has been established. *Standage Ventures v. Arizona*, 499 F.2d 248, 250 (9th Cir. 1974); *Fisher v. Golden Valley Electric Ass'n*, 658 P.2d 127, 130 (Alaska 1983); *Ball v. Stevens*, 158 P.2d 207, 209 (Cal. 1945); *Smith v. Mitchell*, 58 P. 667, 668 (Wash. 1899). Moreover, as noted by the Tenth Circuit in *Hodel*, 848 F.2d at 1080 (10th Cir. 1988), the Department of the Interior has long interpreted the RS 2477 grant as effective "upon the construction or establishing of highways in accordance with State laws". 43 C.F.R. § 244.55 (1939); 43 C.F.R. § 2234.2-5(b) (January 1, 1965) (same); 43 C.F.R. § 2822.2-1 (January 1, 1971)

(same); 43 C.F.R. subpart 2822, *removed*, 45 F.R. 44537 (July 1, 1980).

The Ninth Circuit Court of Appeals' decision departs from the traditional interpretation of the scope of the grant under RS 2477. Ignoring the fact that burdensome requirements were not attached to RS 2477's grant of rights of way for the benefit of the settlers of the western states, the Ninth Circuit Court of Appeals appears to inject novel restrictions on Congress' grant which are unfounded in federal law, inconsistent with the clear purpose of the original grant, and inconsistent with the Alaska Supreme Court's interpretation of what was required in Alaska to accept the congressional grant. Such a change of course, which amounts to a re-writing of Congress' grant one hundred thirty years after its passage, should not pass unchecked.[4]

A. The Ninth Circuit's requirement of construction of a wagon road to constitute acceptance of the grant is unfounded and conflicts with the Alaska Supreme Court's holdings on what constitutes acceptance, thus restricting the scope of the grant under RS 2477.

The state's argument that the Ninth Circuit has improperly narrowed the scope of the grant offered under RS 2477 depends in part upon surmise, as neither

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[4] Particularly at a time when Congress has blocked the Department of the Interior from implementing new regulations interpreting RS 2477 restrictively, *see* Pub. L. 104-134, § 110, 110 Stat. 1321-177 (1996), Pub. L. 104-208, § 108, 110 Stat. 3009-200 (1996), the Supreme Court should not lend its sanction to the Ninth Circuit's wielding of a free license to narrow the scope of RS 2477's grant, even on a case by case basis.

the district court's findings nor the Ninth Circuit's terse September 20, 1996 decision agreeing with the district court offer an explicit statement of the courts' understanding of the law. Yet it appears that Mr. Shultz' claim was deemed without sufficient factual support because of Mr. Shultz' failure to prove public user of a wagon trail as the mode of acceptance of Congress' grant under RS 2477, rather than on a failure to present proof of the existence of access across what is now Fort Wainwright.[5]

The Ninth Circuit's tacit ratification of the district court's fixation on a wagon road as the measure of a completed grant under RS 2477 is not reflected in the terms of the statute or the decisions of Alaska's highest court. While certainly many RS 2477 rights of way have evolved into routes capable of supporting wagon or even automobile traffic, the law does not demand that the grant be held in abeyance until that stage of development is achieved. *Dillingham Commercial Co., Inc. v. City of Dillingham*, 705 P.2d 410, 414 (Alaska 1985); *Ball v. Stephens*, 158 P.2d 207, 210 (Cal. 1945).[6]

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[5] The district court's focus on the existence of a wagon trail is linked to an interest in how George Nissen, the original homesteader of Shultz' property, brought his crops to market in Fairbanks. Yet regardless of how the annual transport of the harvest occurred, the district court findings do admit of Nissen's overland travel between Fairbanks and his homestead. *See* District Court Findings ¶¶ 16, 35, 36, 39, 46, 47, 51, 53; *Shultz v. Dep't of Army*, 10 F.3d 649, 657-9 (9th Cir. 1993), *withdrawn*, 96 F.3d 1222 (9th Cir. 1996).

[6] Indeed, proving which of the modern, paved highways crossing the western states were more than foot trails at the time the lands crossed were reserved or otherwise made unavailable for acceptance of the RS 2477 grant would be a daunting task.

The grant provided under RS 2477 is not predicated upon the establishment of a wagon road. Instead, the grant has long been understood, as a matter of federal law, to be as broad as the state law providing for the establishment of highways. In Alaska, state law defines highways to include trails and walks. AS 19.45.001(9). Consistent with the understanding that the essential feature of a "highway" is its public character, satisfaction of the state definition does not hinge upon the capability to support any particular mode of transportation. Accordingly, the Alaska Supreme Court has acknowledged:

> Nor does the route need to be significantly developed to qualify as a "highway" for RS 2477 purposes; even a rudimentary trail can qualify. *See Dillingham*, 705 P.2d at 414; *Shultz*, 10 F.3d at 656-7.

Fitzgerald v. Puddicombe, 918 P.2d 1017, 1020 (Alaska 1996).

Neither the original district court findings nor the Ninth Circuit decision cite any authority to narrow the scope of Congress' grant of a right of way under RS 2477 to those routes capable of supporting public wagon traffic. Such a limitation is clearly not found in the law of Alaska, nor is it well adapted to the conditions faced by the western pioneers who relied upon RS 2477 to legitimize routes between points of interest. The dedication offered in RS 2477 was enacted in a period of U.S. history when Congress was encouraging westward expansion, settlement, and development. That rustic conditions would beget at first rustic trails was surely anticipated. There is no indication that Congress intended to further the hardship and sacrifice of the nation's pioneers by imposing burdensome conditions on its offer of a grant of

public rights of way. Yet *Shultz* suggests a re-writing of Congress' grant divorced from its history and purpose, and contrary to long settled expectations.

B. The Ninth Circuit's requirement of proof of the exact location of the entire route conflicts with the Alaska Supreme Court's holding that the precise location of the trail between two fixed termini can vary over time.

Precisely why the district court reached the blanket conclusion that no RS 2477 right of way was established across Fort Wainwright or on what basis a divided panel of the Ninth Circuit reversed itself to join in that conclusion defies sure detection. Yet it appears that in reaching this conclusion, the courts required a degree of identity between the historic and modern routes not demanded by Alaska law nor realistic in light of the circumstances. The Army acquired Fort Wainwright long after the homesteaders settled in the area, with an obligation to honor valid existing rights.

The district court appears to have rejected the RS 2477 claim in spite of the existence of and reliance upon a network of trail and road combinations across the unreserved lands, finding that Shultz failed to demonstrate that any one individual route was favored or precisely aligned with the modern route. However, as was correctly determined in *Shultz v. Dep't of Army*, 10 F.3d 649 (9th Cir. 1993), *withdrawn*, 96 F.3d 1222 (9th Cir. 1996), and later confirmed by the Alaska Supreme Court in *Fitzgerald v. Puddicombe*, 918 P.2d 1017 (Alaska 1996), the existence of an RS 2477 route across property may be established

"[a]lthough a single trail may not have predominated prior to entry." 918 P.2d at 1020. The Alaska court explained that:

> [I]t is not necessary, as the trial court appears to suggest in its findings, that the precise path of the trail be proven. It is enough for one claiming an RS 2477 right-of-way to show that there was a generally followed route across the land in question. *See Shultz*, 10 F.3d at 655.

Fitzgerald, 918 P.2d at 1021-2. The Alaska court's statement of what is required to establish a right of public passage across land properly considers the difficulties attached to travel in Alaska and the need to account for the character of the land. *Id.* at 1020. With primitive trails, seasonal variation of the precise line of travel is a practical necessity.

The decision below errs by discounting public user which manifests an intent to establish free public passage between two termini simply because of a deviation from a precise line of travel, occasioned by natural conditions or seasonal variations. The fact that there is not a perfect identity between the modern and historic routes does not defeat that original dedication of a right of passage across a property.[7] While there may be some question as to where to locate the route, that issue is distinct from the question of whether the property is burdened with a public right of way. *Compare Fitzgerald*, 918 P.2d at 1022

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[7] While there may not be a precise identity between the modern route and the early road/trail combination relied upon by George Nissen and the other early settlers, both routes essentially track the Chera River and overlap in places.

(Remand to the trial court to determine the exact location of the right of way.)

C. The Ninth Circuit suggests a quantum of usage is required that exceeds that required by the Alaska Supreme Court.

Despite the fact that George Nissen, Shultz' predecessor-in-interest, had a window of opportunity of at least three years to establish a public route between his homestead and Fairbanks before intermediate lands were taken out of the public domain, the Ninth Circuit, in affirming the district court's decision, concluded that there was not sufficient use to establish an RS 2477 route. Even if one accepts the Court's supposition that George Nissen may not have taken his harvest of crops to market overland by wagon or otherwise, the Ninth Circuit frustrates the purposes of Congress' grant under RS 2477 by its apparent sweeping discount of other evidence of Nissen's overland travel between Fairbanks and his homestead as public user sufficient to accept the RS 2477 grant under Alaska law.

Alaska law properly reflects the intent of the congressional grant as a means to encourage settlement and productive use of the lands entered. In keeping with this spirit, the Alaska Supreme Court rejected a claimed RS 2477 right of way in *Hamerly v. Denton*, 359 P.2d 121 (Alaska 1961), with the explanation that where "use [of a road] was infrequent and sporadic" by persons who "had no real interest in the lands to which it gave access," "[t]he road could not be considered as something that

was either necessary or convenient for the accommodation of the public." *Hamerly*, 359 P.2d at 125. Where, however, use of a road or trail was necessary to travel between genuine points of interest, that use can suffice to establish acceptance of RS 2477's grant.

Accordingly, just as travel by the public to mining claims beyond the parcel in question in *Fitzgerald* established that the trail was "necessary or convenient for the accommodation of the public," *Fitzgerald*, 918 P.2d at 1022 (citing *Hamerly*), a homesteader's use of a route between his homestead and the nearest settlement is public use sufficient to establish acceptance of an RS 2477 right of way. Such a route may be a highway even if it reaches only one property or is used by only one person. *Leach v. Manhart*, 77 P.2d 652, 653 (Col. 1938). The dedication offered in RS 2477 may be accepted by the public through "use by those for whom it is necessary or convenient." *Id.* The Ninth Circuit's decision suggests, without explanation or authority, that much more is required.

II. *Shultz* raises important questions of federal law, and its relationship to state law, which should be settled by this Court.

The interpretation of RS 2477 has far broader significance than its effect upon individual landowners.[8] The

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[8] Of course, novel and burdensome requirements for the validation of RS 2477 claims will have a profound effect upon individual and other private landowners seeking to secure a right of access to their lands. Substantial resources must be devoted to the increasingly uncertain cause of defending rights

course of the State of Alaska and its western neighbors will be mapped in part by decisions of courts interpreting RS 2477 and any concomitant right of access. Yet *Shultz* obscures the path towards an understanding of the extent to which Congress' grant of rights of way may be relied upon to provide the bedrock for the development of a transportation network and to fulfill the promise of relief from isolation. The clarity of the Supreme Court is needed to provide guidance to both the lower courts and litigants as numerous RS 2477 claims impacting both public and private lands are yet to be resolved.

A. The Ninth Circuit's cursory and vague opinion offers little guidance for lower courts reviewing RS 2477 claims.

Since much of the land in the western states remains in federal ownership, federal courts, including the Ninth Circuit can expect to hear many of the outstanding RS 2477 claims. Yet the decision in *Shultz*, which stands in startling contrast to the reasoned decision it supersedes, represents a step backwards in the development of the body of law guiding the resolution of RS 2477 claims. Rather than illuminate the law, the one paragraph per curium decision released by a divided panel, 96 F.3d at 1223 (9th Cir. 1996), simply invites speculation and surmise as to the legal standards governing acceptance of RS 2477's grant.

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of access. Without direction from this Court, landowners have no way to evaluate their claim and whether they have any hope of finding relief in the courts.

Though *Shultz* may resolve the particular dispute between the parties, the court's unexplained reversal of the twenty-four page decision reported at 10 F.3d at 649 (9th Cir. 1993) leaves nothing but questions for litigants to come. The 1993 decision reversed the district court on the grounds that it had misinterpreted the law as well as the facts on record. The decision, called scholarly by the *Shultz* dissent, 96 F.3d at 1223 (Alarcon, J., dissenting), bears testament to the court's critical review of both the law and the factual record upon which the district court based its findings. Yet, despite the absence of the introduction of any new authority or evidence on rehearing, the court went from having a definite and firm conviction that the district court had made a mistake, 10 F.3d at 662, to "ultimately agree[ing] with the district court that Shultz has not sustained his burden to factually establish a continuous RS 2477 route or right-of-way under Alaska common law." 96 F.3d at 1223. Whether the Ninth Circuit intended by its silence to abandon its 1993 criticisms of the district court's assessment of the law governing RS 2477 claims is indiscernible from its latest statement, as no effort is made to identify the determinative factual findings. It may be that the Ninth Circuit's about-face is complete and it has chosen to embrace as the law what it once characterized as a misunderstanding of the proper standard. By thus announcing the winner but not the rules of the game, lower courts and potential litigants can only speculate as to the requirements of the law governing RS 2477 claims.

The Supreme Court should grant certiorari so lower courts and litigants may look forward to a decision on

this matter offering illumination rather than obfuscation of the law.

B. This Court has not ruled on the requirements for acceptance of an RS 2477 right of way; its guidance is needed to prevent and simplify future litigation.

Despite the long history of RS 2477 and its broad impact upon the development of the west, the Supreme Court has not spoken directly on the requirements for acceptance of an RS 2477 right of way.[9] The time is ripe for this Court to break the silence and provide its guidance.

Conflict over the bounds of the grant and its proper interpretation divides the state and federal courts and has left the Department of the Interior at odds with Congress.[10] In the western states, both private and public land owners and managers will be impacted by the settlement of rights vested under RS 2477. As a landowner and steward of the public's right to access public highways, the State of Alaska is dedicated to preventing legitimate RS 2477 routes from being foreclosed and the future

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[9] This Court did reference RS 2477 and the general principles supporting the development of roads across the public domain in *Central Pac. Ry. Co. v. Alameda County, California*, 284 U.S. 463 (1932). However, the specific requirements for the acceptance of RS 2477's grant were not at issue as the highway in question pre-dated the enactment of RS 2477, having been established in accordance with state law in 1859.

[10] *See supra* n.4 for discussion of the dispute between Congress and the Department of the Interior.

development of the state thwarted by the adoption of new narrow and restrictive interpretations of the requirements for acceptance.

The state urges this Court to grant certiorari as only this Court can authoritatively set potential litigants, state and federal courts, as well as the other branches of the federal government, on course towards the proper interpretation of RS 2477's grant.

CONCLUSION

For the foregoing reasons, and those stated in the Petition, the Petition for Writ of Certiorari should be granted.

Respectfully submitted,

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(5)

FILED
MAR 19 1998
CLERK

No. 97-1117

In The

Supreme Court of the United States

October Term, 1997

PAUL G. SHULTZ,

Petitioner,

vs.

DEPARTMENT OF ARMY,
UNITED STATES OF AMERICA,

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

REPLY BRIEF FOR PETITIONER

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CONFLICT WITH STATE LAW

Shultz v. Army, 96 F.3d 1222 (9th Cir. 1996) (*Shultz III*) held and the Department of the Army, United States of America (Army) argues that Paul G. Shultz's (Shultz) evidence does not meet the required burden of proof — showing a continuous route across the land. Respondents' Brief at 11-12. This proposition finds no support in Alaska law. The requisite burden of proof is a question of state law. *See Fisher v. Golden Valley Electric Association*, 658 P.2d 127, 130 (Alaska 1983) and *Shultz v. Army*, 10 F.3d 649, 655 (9th Cir. 1993) (*Shultz II*). The Army does not question that State law applies. In Alaska, proving public user between termini is the required burden of proof.

> The extent of *public use* necessary to establish acceptance of the RS 2477 grant depends upon the character of the land and the nature of the *use*. . . . Although "infrequent and sporadic" use is not sufficient to establish public acceptance of the grant, . . . *continuous use is not required*. . . . Nor does the route need to be significantly developed to qualify as a "highway" for RS 2477 purposes; even a rudimentary trail can qualify.
>
> * * *
>
> In *Dillingham*, we held that a road running across private property from the city docks to the town was subject to an RS 2477 right-of-way because roughly the same route had been used in the 1920's and 30's, before the property was withdrawn from the public domain. . . . The observation, from *Hamerly*, that a public highway must be "either necessary or convenient for the accommodation of the public" was expressed as a requirement that the claimed right-of-way must have "definite termini." . . . However, we also held that "[i]f there is a public road on [the property], it may be used for any purpose consistent with public travel." [Emphasis added and citations omitted.]

Fitzgerald v. Puddicombe, 918 P.2d 1017, 1020 (Alaska 1996).

Fitzgerald considered and rejected "continuous use." Fitzgerald also considered and rejected any requirement that the exact location be proven or that the trail's location be fixed.

> In any event, it is not necessary, as the trial court appears to suggest in its findings, that the precise path of the trail be proven. It is enough for one claiming an RS 2477 right-of-way to show that there was a generally-followed route across the land in question. . . . [Citations omitted.]

Id. at 1021-1022.

Fitzgerald is the rule of law (burden of proof) which applies to this case. *Shultz II* correctly applied Alaska law. *See Shultz II*, at 655-656. *Shultz III* and the Army have misinterpreted and misapplied the burden required by Alaska law. If there ever were doubt concerning the required burden, it was answered by *Fitzgerald*.

The Army dwells on a discussion of the district court's findings. Such argument does not address the conflict between the Circuit and the Alaska Supreme Court. *Shultz II* demonstrates that the district court's error was the incorrect application of Alaska law, not its findings of fact. *Fitzgerald* approved *Shultz II*'s analysis and application of Alaska law. *Shultz III*, like the district court, adopted an incorrect burden of proof.

The district court required proof of a wagon road. Pet. App. 35a-48a, para. 33 and 39. The Army agrees that a wagon road is not required. Respondents' Brief at 11.[1] The Army argues that Shultz did not prove a continuous route. Respondents' Brief at 12-13. *Shultz III* requires a "continuous route." This term is not defined. This proposition is not supported by citation. *Dillingham* and *Fitzgerald* say otherwise. *Dillingham Commercial Co., Inc. v. City Of Dillingham*, 705 P.2d 410, 414 (Alaska 1985); and, *Fitzgerald*, at 1020-1022.

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1. The Army's present position is contrary to the position it argued in *Shultz II*. *Fitzgerald* leaves no room for argument on this point; proof of a wagon road is unnecessary. A rudimentary trail is sufficient. *Fitzgerald*, at 1020.

The Army references witness Robert Busby's testimony in support of its argument. Busby testified that the country was open and there was no reason to follow a precise trail. Respondents' Brief at 19, and Pet. App. 35a-48a, para. 46-47, 50-53. *Fitzgerald* rejects a single trail requirement.

> Although a single trail may not have predominated prior to entry, a fair reading of Sumner's testimony reveals that he generally followed the trails' established route in constructing his driveway: . . .
>
> * * *
>
> . . . It is enough for one claiming an RS 2477 right-of-way to show that there was a generally-followed route across the land in question. *See Shultz,* 10 F.3d at 655.

918 P.2d at 120-1022.

The Army talks of "opportunistic travel" and the change in location of the existing road versus historical trails. *Fitzgerald,* as did *Shultz II,* makes very clear that homesteading is not "opportunistic travel" and that present deviation from the original trail location is irrelevant to proving an RS 2477. Busby's testimony that the area in dispute was "open country" establishes Shultz's point. If the country is open, users will take the most advantageous route, which may not be the same "continuous" route. The route may vary depending on the season, weather, and agreement with adjacent land owners. If the Army or homesteaders allowed a different or better route closer to the river, which provided the same access, then blockage of other trails is irrelevant. The Army's argument that the present day route must be exactly the same as the historical route is contrary to *Fitzgerald* and finds no support in any Alaska decision.

The Ninth Circuit and the Alaska Supreme Court are in conflict concerning the requisite burden of proof. Mixed (or at best confusing) messages will be sent to Federal and State trial courts if the conflict between *Shultz III* and *Fitzgerald* is not resolved. Only the United States Supreme Court has the jurisdiction to resolve this conflict. This is not an issue which is limited to this litigation.

The application of 43 U.S.C. § 932 is a reoccurring issue in the State of Alaska and the Western United States.

THE NINTH CIRCUIT'S DEPARTURE FROM ACCEPTED JUDICIAL STANDARDS

There is no reasoned explanation for *Shultz III*. The Army's petition for rehearing identified neither new evidence nor a change in the law. *Shultz III* gives no explanation for the summary conclusion that Shultz failed his burden of proof. This conclusion is unjustifiable given the detailed analysis of *Shultz II* and the Alaska Supreme Court's *Fitzgerald* decision. The circumstances surrounding *Shultz III* and its conclusion are simply bizarre. Even the Army is unable to identify any judicial precedent which followed a similar pattern.

JURISDICTION/STANDING

The Army's jurisdictional argument that Shultz's Petition for Rehearing before the Ninth Circuit Court of Appeals was untimely by one day, is irrelevant.[2] The court of appeals accepted Shultz's filing and granted Shultz's petition. Pet. App. 63a. The Army does not dispute that Shultz's petition for writ of certiorari was timely filed. Supreme Court Rule 13.1 states that the request for the writ is timely if filed within ninety (90) days "after entry of the judgment." The Ninth Circuit Court of Appeals judgment granting Shultz's petition for rehearing was entered October 8, 1997. Shultz's petition for writ of certiorari was filed on January 5, 1998, eighty nine (89) days following entry of judgment.

The Army's argument concerning Shultz's standing was rejected by the district court. The Army did not appeal this decision.

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2. Shultz sent his Petition for Rehearing by private courier, DHL Worldwide Express (DHL), on October 31, 1996, four (4) days prior to the filing deadline. App. A, DHL Airbill. Shultz is presently seeking confirmation from DHL that it delivered the document prior to November 4, 1996. If Shultz's petition was one (1) day late because of courier problems, the court of appeals certainly would have extended the deadline and accepted Shultz's petition. Fed. R. App. P. 26(b) and 40(a).

The issue is not before this court. Even if the issue were considered, Alaska law is clear; Shultz does have standing. *See Shultz II*, at 653.

The Army's final argument is that Shultz's claim is barred by the statute of limitations, 28 U.S.C. § 2904a(g). *Shultz III* did not decide this issue. *Shultz III*, at 1222. *Shultz II* rejected this argument. *Shultz II*, at 661-662. If the burden of proof outlined by *Fitzgerald* and *Shultz II* is followed, the statute of limitations issue is moot.

CONCLUSION

For the reasons set forth herein and in Shultz's petition, the writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX A — DHL WORLDWIDE EXPRESS AIRBILL, DATED OCTOBER 31, 1996

BEST AVAILABLE COPY